Supreme Court, U.S.
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No. 95-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 301 of the Clean Water Act prohibits the discharge of pollutants without a permit.

2. Whether there is an exception to § 301's absolute prohibition against the discharge of pollutants without a permit when, as the Eleventh Circuit held in this case, the following four factors are met: (1) compliance with the no discharge standard is allegedly factually impossible; (2) no permit for the discharge allegedly exists; (3) the discharger allegedly was in good faith compliance with local pollution control requirements that substantially mirrored a proposed NPDES discharge standard; and (4) the discharges allegedly were minimal.

3. Whether the permanent injunction issued against JMS Development Corp. by the district court in this case complies with Fed. R. Civ. P. 65(d).

LIST OF ALL PARTIES

Terence D. Hughey
JMS Development Corp.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") is reported at 78 F.3d 1523 (11th Cir. 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996), and is reprinted in the Appendix at p. 4-A. The orders of the United States District Court for the Northern District of Georgia in this case, No. 1:92-CV-2051-RHH, are

unreported. The relevant opinions of the District Court are reprinted in the Appendix at pp. 31-A through 127-A.

STATEMENT OF JURISDICTION

The Court has jurisdiction in this case, pursuant to 28 U.S.C. § 1254(1), to review by writ of certiorari the final decision of the United States Court of Appeals for the Eleventh Circuit in Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. April 1, 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996), which conflicts with the decision of this Court in Weinberger v. Romero-Barcelo, 465 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982), and directly conflicts with the following decisions of other Circuit Courts: Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831); National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977); Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-28 (3rd Cir. 1979)), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980); Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983), and which presents issues of national importance.

RELEVANT STATUTES/REGULATIONS[1]

Petitioner relies primarily on the following statutes and regulations: 33 U.S.C. § 1251(a); 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(a); 33 U.S.C. § 1342(b); 33 U.S.C. § 1342(k); 33 U.S.C. § 1362(6); 33 U.S.C. § 1362(14); 33 U.S.C. § 1365; 33 C.F.R. § 328.3(a); O.C.G.A. § 12-5-30(a); DNR Rule 391-3-6-.15.

STATEMENT OF THE CASE

I. Introduction

In 1972, Congress reacted to water pollution so severe that the Cuyahoga River in Cleveland, Ohio actually caught fire,[2] and passed the Federal Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251, et seq. (the "Clean Water Act", "CWA" or the "Act"). The CWA passed Congress overwhelmingly[3] and became law on October 18, 1972. In language as mandatory and absolute as any Congress has ever enacted, Congress sought to control continued pollution of the country's rivers, streams and lakes, by stating: "except as in compliance with [specified sections of the Act], the discharge

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[1]The relevant text for these citations is contained in the Appendix at p. 1-A.

[2]*City Investigating Cause of River Fire*, THE PLAIN DEALER, June 24, 1969. (Reprinted in Appendix at p. 129-A).

[3]The Senate approved the amendments, 52 yeas to 12 nays and the House approved the amendments, 247 yeas to 23 nays. 118 Cong. Rec 36871 and 37054 (1972).

of any pollutant by any person is illegal." 33 U.S.C. § 1311. Congress' absolute prohibition has remained unchanged and intact through several amendments to the Clean Water Act, and until the Eleventh Circuit's opinion[4] in this case, has been fully supported by strong language from this Court, and other federal courts that have interpreted the law since 1972. Now, for the first time, contrary to express language in this Court's opinions, and in direct conflict with rulings from other Circuit Courts of Appeal, the Eleventh Circuit, Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996), ("JMS"), has created a judicial exception to Congress' absolute prohibition, an exception which is unsupported by any language in the Clean Water Act, and which finds no support in the legislative history of the Act. Petitioner seeks a writ of certiorari from this Court to correct the travesty of justice thus visited by the Eleventh Circuit upon the citizens and waters of this country.[5]

The Eleventh Circuit's judicial exception to Congress' absolute prohibition of the discharge of pollutants into waters of the United States without a permit allows the continuation of pollution which the U.S. Environmental Protection Agency ("EPA") has called "the leading [and the] largest remaining, virtually unaddressed source of water pollution" in the country, (R3-26-7), "causing an estimated one-third of impaired water

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[4]The Eleventh Circuit's opinion in this case was written by U.S. District Court Judge Wilbur Owens, sitting by designation.

[5]The case originated in the United States District Court for the Northern District of Georgia. The district court had federal question jurisdiction over the case to review Mr. Hughey's claims under the federal Clean Water Act, 33 U.S.C. § 1251 et seq.

quality nationwide" (R2-19-18), when "slumbering [state] agencies" like the State of Georgia in this case fail or refuse to enforce the law's requirements. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) (citizen suits are designed for when federal, state or local agencies fail to exercise enforcement authority); Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d Cir. 1976) (the purpose of the citizen's liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction); S. REP. NO. 414, 92ND CONG., 2ND SESS. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 (citizens perform a public service by bringing citizen suits under the CWA). In doing so, the Eleventh Circuit nullified another crucial provision of the Clean Water Act, the citizens suit provision contained in 33 U.S.C. § 1365, which the courts have acknowledged was established by Congress to supplement the enforcement of the Act by federal and state agencies. Gwaltney, 484 U.S. at 60, 108 S. Ct. at 383 (a citizen suit is meant to supplement governmental action); Commonwealth of Massachusetts v. United States Veterans Administration, 541 F.2d 119, 121 (lst Cir. 1976) (the Clean Water Act's citizen suit provision was designed to supplement and expedite administrative action to abate violations of the Act).

Because the opinion written by Judge Owens is contrary to express language contained in this Court's opinion, because the opinion directly conflicts with the opinion of the Fifth Circuit Court of Appeals in Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831) and previous holdings of the District of Columbia,

Second, Third and Fourth Circuit Courts of Appeals,[6] and because the opinion judicially creates a gaping hole in the foundation of Congress' structure for controlling pollution of this country's waters, and allows massive pollution of the waters to continue unchecked, Petitioner submits that, in satisfaction of all this Court's factors for the issuance of a writ of certiorari, Sup. Ct. R. 10, this case begs for the Court's attention.

In reaching its opinion, the Eleventh Circuit ignored, without reversing, crucial holdings by the trial court which state a clearer picture of the facts than is contained in the

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[6]National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (the discharge of any pollutant by any person without a permit is unlawful); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977) (Congress intended the NPDES permit to be the only means by which a point source may escape the total prohibition of § 301 of the Act); Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) (the Act provides that absent a permit, the discharge of any pollutant by any person shall be unlawful); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-28 (3rd Cir. 1979)), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980) (the Act flatly prohibits any discharge of pollutants even where EPA has failed to promulgate applicable effluent limitations, and the discharger has not applied for a permit; Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983) (the Act forbids any pollutant discharge into waters of the U.S. except in accordance with a valid NPDES permit).

Eleventh Circuit opinion.[7] A brief rendering of those facts therefore is necessary here.

II. Facts.

On August 28, 1992, Petitioner Terence D. Hughey ("Hughey") began this litigation in the United States District Court for the Northern District of Georgia by filing a complaint against JMS Development Corporation ("JMS") seeking injunctive relief, civil penalties and attorneys' fees, pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a). For a period of at least six months prior to that date, and continuing thereafter, JMS knowingly discharged polluted water from its residential subdivision development in Gwinnett County, Georgia without a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, in direct violation of Section 301 of the CWA, 33 U.S.C. § 1311. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. February 24, 1994), pp. 9-12, (R6-58-9-12) (reprinted in Appendix at p. 102-A); R11-6-8, 79-85; R12-15-23; P. Exh. 25, 29, 31 (photos, videotape and sample results). Appellant's discharges exceeded limits established in state and local law by more than 2,000 times those limits. R3-26-3; P. Exh. 28, 31 (sample results). JMS' polluted discharges converted a

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[7]The Eleventh Circuit did not find any of the district court's factual findings "clearly erroneous" and, therefore, those factual decisions still stand and are still controlling. See Anderson v. City of Bessemer, 470 U.S. 564, 576-78, 105 S. Ct. 1504, 1512-13 (1985) (a reviewing court is bound by the lower court's factual findings, unless those findings are found to be clearly erroneous); Steelcase, Inc. v. Delwood Furniture Co., 578 F.2d 74, 78 (5th Cir. 1978) (a trial court's factual findings are controlling unless clearly erroneous), *cert. denied*, 440 U.S. 960, 99 S. Ct. 1503 (1979).

formerly clear running stream containing organic material and stream life into a dead stream covered by six to nine inches of sediment. R3-26-27; R9-9-10; R11-6-8, 79 to 85; P. Exh. 9 through 24, 29 (photographs). The discharges polluted and choked downstream wetlands, and polluted the Yellow River, into which the stream flowed. Id. The polluted water thereafter flowed through Mr. Hughey's property.

On August 31, 1992, after a hearing at which both parties were represented, the district court entered a temporary restraining order prohibiting further discharges. On October 16, 1992, the court held an evidentiary hearing on Hughey's motion for contempt of the TRO, and on JMS' motion to dissolve the TRO. R8 through R11. On November 4, 1992, the court held an evidentiary hearing on Hughey's motion for preliminary injunction. R11. On November 9, 1992, the district court denied JMS' motions and granted a preliminary injunction, prohibiting further discharges of pollutants into waters of the U.S. without a National Pollutant Discharge Elimination System ("NPDES") permit.[8] R3-26.

After an additional evidentiary hearing on standing, the district court entered final judgment on February 24, 1994 finding that JMS had violated the CWA on seventeen (17) separate occasions by discharging polluted stormwater through point sources constructed by JMS into the waters of the United States without a permit. R6-58-10. The district court assessed civil penalties in the amount of $8,500.00, and ordered JMS to reimburse Hughey for his costs of litigation and attorneys' fees.

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[8]NPDES permits are authorized by § 402 of the CWA, 33 U.S.C. § 1342.

R6-58. The court also entered a permanent injunction prohibiting JMS from discharging "stormwater"[9] into waters of the United States if such discharges would be in violation of the Act. R6-58-14. In a later order, the district court awarded Hughey his attorneys' fees and expenses of litigation. R7-72.

It was undisputed in the district court that soil and sediment from JMS' construction activities constituted "pollutants" within the meaning of the CWA, 33 U.S.C. § 1362(6). It was also undisputed that JMS constructed and operated the pipes through which stormwater containing those pollutants was discharged from the residential development, and that those pipes were "point sources" within the meaning of the CWA, 33 U.S.C. § 1362(14). It was also undisputed that the pollutants were discharged into "waters of the United States", within the meaning of 33 C.F.R. § 328.3(a).

In seeking and obtaining the permanent injunction and penalties assessed by the district court on the basis of such undisputed facts, Mr. Hughey epitomized the private attorney general envisioned by Congress when it enacted the citizen suit provision of the Act. Having noticed in his daily walks through his subdivision that JMS' new development was discharging massive quantities of silt and sediment into a stream, which in turn fed the Yellow River above Mr. Hughey's home, R12-21, 102-103; P. Exh. 9 through 25, 29, 36 (photographs and videotape), Mr. Hughey documented the

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[9]The district court defined "stormwater" as "water that contains sedimentation from land disturbing activities." Hughey v. JMS Development Corp., No. 1:92-cv-2051-RHH (N.D. Ga. November 9, 1992) (R3-27-3) (reprinted in Appendix at p. 34-A).

polluted discharges in videotapes and photographs submitted to the district court. P. Exh. 25, 36 (videotapes); R12-20-24. He also sampled the discharges, documenting levels of pollution over 2,000 times the level allowed under state law. P. Exh. 31 (sample results); R9-29-32; R11-8-13, 15-29, 77-97; see O.C.G.A. § 12-7-6(18) (1992) (setting a limit on turbidity of discharges from construction activities of 50 nephelometric turbidity units ("NTUs") above the level of the receiving stream). He also retained an expert to investigate the pollution and analyze its impact on the stream. The expert, a professor of hydrology and soil science at the University of Georgia, testified that the pollution literally smothered the streambed, and caused polluted water to flow from the subdivision all the way into the Yellow River. R9-9-10.

Mr. Hughey thus sought to address, in a citizen suit filed under the CWA, pollution which the EPA has declared to be "the leading [and the] largest remaining, virtually unaddressed source of water pollution" in the country, EPA RELEASES FINAL STORMWATER DISCHARGE GENERAL PERMIT in "EPA's Environmental News" (September 3, 1992) (R2-19-18) (relevant portions reprinted in Appendix at p. 133-A), which causes "an estimated one-third of impaired water quality nationwide," Environmental Protection Division, Brief as *Amicus Curiae*, Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D.Ga. 1992) (R2-19-18) (reprinted in Appendix at 131-A). The State of Georgia Environmental Protection Division also has recognized that runoff from construction sites is now a significant cause of water quality degradation. Id. at 10.

Contributing to the nationwide trend of uncontrolled discharges of water pollution from construction sites, JMS neither sought nor obtained a permit for its discharges until after the district court entered a temporary restraining order. Although its discharges continued after the TRO was entered, JMS never obtained a permit for the discharges. Finding that the State of Georgia Environmental Protection Division ("EPD"), which had been delegated permit issuing authority pursuant to the CWA, 33 U.S.C. § 1342(b), had not made such a permit available, and ignoring the absolute prohibition under the CWA against discharges of pollutants without a permit, 33 U.S.C. § 1311, the Eleventh Circuit Court of Appeals, in an "interpretation of the statute [which] had not been advanced by any party during the [appeal]", Arkansas v. Oklahoma, 503 U.S. 91, 108, 112 S. Ct. 1046, 1058 (1992), "made a policy choice that it was not authorized to make", Id. at 113, 112 S. Ct. at 1061, and reversed the district court. In order to do so, the Eleventh Circuit created a new exception to § 301 under which any person may discharge pollutants into waters of the United States without a permit if: (1) compliance with the no discharge standard is factually impossible; (2) no permit for the discharge exists; (3) the discharger was in good faith compliance with local pollution control requirements that substantially mirrored a proposed NPDES discharge standard; and (4) the discharges were minimal. For the reasons set forth hereinafter, Petitioner urges the Court to issue a writ of certiorari to review the Eleventh Circuit's opinion, and to reverse the judgment of the Eleventh Circuit, and reinstate the district court's judgment.

ARGUMENT

I. The Eleventh Circuit Opinion Conflicts with Prior Decisions of this Court.

In the almost 25-year history of its interpretations of the CWA, this Court has consistently and unequivocally stated that § 301(a) of the CWA, 33 U.S.C. § 1311, absolutely prohibits discharges of pollutants into waters of the United States unless a permit authorizes such discharges. As Chief Justice Rehnquist stated in one of the earliest cases, the CWA "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 311, 101 S. Ct. 1784, 1789 (1981) ("City of Milwaukee"). Most recently, this Court unanimously reaffirmed that discharges of pollutants without a permit are absolutely prohibited: "[s]ection 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit." Arkansas, 503 U.S. at 102, 112 S. Ct. at 1054. In between, this Court has mirrored in its opinions the absolute language of § 301, stating on numerous occasions that "under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." EPA v. California, *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976) (State Water Resources Control Board); see also E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 118, 97 S. Ct. 965, 970 (1977) ("duPont"); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 72, 101 S. Ct. 295, 301 (1980) ("National Crushed Stone"); Middlesex County

Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11, 101 S. Ct. 2615, 2622 (1981) ("National Sea Clammers"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982) ("Romero-Barcelo"); International Paper Co. v. Ouellette, 479 U.S. 481, 489, 107 S. Ct. 805, 810 (1987) ("Ouellette"); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 53, 108 S. Ct. 376, 379 (1987) ("Gwaltney").

Ignoring these statements, the Eleventh Circuit has smashed a gaping hole in the prohibition of discharges without a permit, which this Court has acknowledged as the foundation of Congress' effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] 33 U.S.C. § 1251(a). See State Water Resources Control Board, 426 U.S. at 205, 96 S. Ct. at 2025 (the NPDES permit program was one of the major changes to the CWA in the 1972 amendments); National Sea Clammers, 453 U.S. at 11, 101 S. Ct. at 2622 (the 1972 amendments shifted the emphasis of the CWA to direct restrictions of discharges); Romero-Barcelo, 456 U.S. at 319, 102 S. Ct. at 1807 (the permit system is the key to accomplishing the purpose of the CWA--the elimination of water pollution); Ouellette, 479 U.S. at 489, 107 S. Ct. at 810 (the NPDES permit system is one of the primary features

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[10]The four factors articulated by the Eleventh Circuit as considerations for determining CWA liability are appropriate only in the penalty phase, and in fact were taken into account by the district court in reducing the penalty award against JMS to $8,500. (R6-58). The Eleventh Circuit has subverted Congress's careful scheme of establishing absolute liability for the discharge of pollutants without a permit, while allowing special mitigating circumstances (such as those illustrated by the four factors) to reduce the civil penalty imposed against the discharger.

of the 1972 Amendments to the CWA). In creating an exception which contradicts numerous opinions of this Court, and which "[t]he plain language of the statute does not support", National Crushed Stone, 449 U.S. 64, 73, 101 S. Ct. 295, 302, the Eleventh Circuit reacted to what it perceived to be an injustice created by the asserted unavailability of a permit for JMS' discharges, coupled with what it perceived to be the minimal level of those discharges.[11] Making a judgment that the law as enacted by Congress would "compel an odd result," JMS, 78 F.3d at 1523, the Eleventh Circuit substituted its own judgment for that of Congress. However, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." City of Milwaukee, 451 U.S. 304, 305, 101 S. Ct. 1784, 1786. In doing so, the Eleventh Circuit also ignored this Court's holding in Romero-

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[11]As stated above, the Eleventh Circuit's perception of the case directly contravened the facts as found by the district court from undisputed evidence in the case: (1) that prevention of the discharges was possible and in fact easy enough to allow reduction of the assessed penalty due to the district court's finding that JMS did not gain economic benefit from failing to install the necessary pollution control mechanisms, Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. February 24, 1994), p. 12 (R6-58-12) (reprinted in Appendix at p. 102-A); and (2) that JMS violated state effluent limitations on the 17 occasions on which it discharged pollutants without a permit, Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. December 15, 1993), pp. 9-10, 13, 15, 22, 27 (R6-52-9-10, 13, 15, 22, 27) (reprinted in Appendix at p. 80-A). The Eleventh Circuit also ignored EPA-approved state regulations which provided for the availability of a permit covering JMS' discharges of stormwater containing soil and sediment from JMS' construction activities, which JMS did not even attempt to obtain. O.C.G.A. § 12-5-30(a); DNR Rule 391-3-6-.15. Finally, the Eleventh Circuit ignored undisputed facts in the record that JMS' discharges had smothered the life of the receiving stream, R9-9-10, and therefore were not "minimal."

Barcelo, which should have compelled affirmance of the district court's order.

In Romero-Barcelo, this Court affirmed a district court order finding that discharges of ordnance by the United States Navy through accidental bombings of navigable waters, without a permit, were unlawful under § 301(a) of the CWA. This Court affirmed the district court's holding that such discharges were unlawful, even though EPA had not made a permit available for such discharges, and even though the discharges were minimal and "have not harmed the quality of the water." Romero-Barcelo, 456 U.S. at 307, 102 S. Ct. at 1801. Those holdings were affirmed by this Court without discussion, on its way to ruling that the district court properly exercised its equitable discretion in failing to enjoin the discharges, and instead ordering the Navy to obtain a permit from EPA for its discharges.

The Eleventh Circuit's opinion below therefore contradicts not only numerous statements in this Court's opinions that the CWA prohibits all discharges of pollutants into waters of the United States without a permit, but also directly contradicts this Court's affirmance of the district court order in Romero-Barcelo, that even minimal, nonharmful discharges of pollutants into waters of the U.S. are illegal without a permit, even though permits for such discharges have not been made available by EPA.[12] Because the Eleventh Circuit's opinion

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[12]The Eleventh Circuit's opinion also conflicts with the Court's finding that an agency's interpretation of a statute is entitled to deference. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S. Ct. 455, 461 (1985); Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S. Ct. 1102, 1107; Chevron U.S.A.,

"has decided an important federal question in a way that conflicts with relevant decisions of this Court", Sup. Ct. R. 10(c), this Court should grant certiorari and reverse the Eleventh Circuit.

II. The Eleventh Circuit's Opinion Conflicts with Decisions of Other United States Courts of Appeals on the Same Matter.

It cannot be argued that the "chemical, physical, and biological integrity of the Nation's waters", 33 U.S.C. § 1251(a), is a matter of utmost national importance. This Court has acknowledged the importance of a correct interpretation of the CWA by granting certiorari on at least fourteen (14) separate occasions in the last 20 years to correct erroneous interpretations of the CWA.[13] This Court has not hesitated to

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Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-945, 104 S. Ct. 2778, 2781-2783 (1984). The EPA consistently interprets § 301 of the CWA as an absolute prohibition against the discharge of pollutants into waters of the U.S. without a permit. See 55 Fed. Reg. 47990, 47990 (1990); 60 Fed. Reg. 53529, 53529 (1995); 60 Fed. Reg. 62546, 62547 (1995); 61 Fed. Reg. 1730, 1731 (1996) (reprinted in Appendix at pp. 135-A through 138-A). The Eleventh Circuit's opinion, creating an exception to the absolute language of § 301, further conflicts with the precedent of this Court because it fails to give deference to the EPA's interpretation of § 301. Riverside Bayview Homes, 474 U.S. at 131, 106 S. Ct. at 46; Chemical Manufacturers, 470 U.S. at 125, 105 S. Ct. at 1107; Chevron, 467 U.S. at 842-845, 104 S. Ct. at 2781-2783.

[13]EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 96 S. Ct. 2022 (1976); DuPont, 430 U.S. 112, 97 S. Ct. 965 (1977); National Crushed Stone, 449 U.S. 64, 101 S. Ct. 295 (1980); City of Milwaukee v. Illinois and Michigan, 451 U.S. 304,101 S. Ct. 1784 (1981); National Sea Clammers Assoc.,453 U.S. 1, 101 S. Ct. 2615 (1981);

grant certiorari to resolve conflicts among the Circuit Courts of Appeal on interpretations of the CWA.

The Eleventh Circuit opinion in this case directly contradicts, without even citing, the holding of the United States Court of Appeals for the Fifth Circuit in Cedar Point Oil Co., 73 F.3d at 561, and holdings of the District of Columbia (National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977)), Second (Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995)), Third (United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-38 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980)), and Fourth (Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983)), Circuit Courts of Appeal. The cited cases from the District of Columbia, Second, Third and Fourth Circuits all follow the above quoted statements from this Court's opinions, and hold, *e.g.*, that Congress intended the NPDES permit to be the only means by which a point source may escape the total prohibition against discharges of pollution under § 301(a) of the CWA. Costle,

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Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798 (1982); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455 (1985); Chemical Manufacturer's Assoc. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 105 S. Ct. 1102 (1985); Ouellette, 479 U.S. 481, 107 S. Ct. 805 (1987); Gwaltney, 484 U.S. 49, 108 S. Ct. 376 (1987); U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112. S. Ct. 1627 (1992); City of Burlington v. Dague, 112 S. Ct. 2638 (1992); Arkansas v. Oklahoma, 503 U.S. 91, 112 S. Ct. 1046 (1992); PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994).

supra. The Eleventh Circuit's creation of an exception to that absolute prohibition contradicts those holdings.

The Eleventh Circuit decision most directly conflicts with the recent decision of the Fifth Circuit in Cedar Point Oil. In that case, the plaintiff filed a citizen suit alleging that Cedar Point Oil "was violating the CWA by discharging produced water into Galveston Bay without a permit ... ." Cedar Point Oil, 73 F.3d at 550. Like the defendant in this case, Cedar Point Oil argued that the Sierra Club had "failed to state a claim with respect to the discharges ... because EPA has not established an applicable effluent limitation or permit for those discharges." Id. at 559. Rejecting the contention adopted by the Eleventh Circuit in this case, the Fifth Circuit held that "a citizen may bring an action against a person allegedly discharging a pollutant without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit." Id. at 561. Without citing or mentioning the Cedar Point Oil decision, the Eleventh Circuit reached a directly contrary result in this case, holding that the failure by the Georgia EPD (which had been delegated permit issuing authority from the EPA pursuant to 33 U.S.C. § 1342) to make a permit available, justified JMS' discharges in this case, and, together with the other factors established by the Eleventh Circuit, made those discharges lawful.

The Fifth Circuit's decision in Cedar Point Oil was based on a careful review of the language utilized by Congress in the CWA, and the legislative history of the CWA. For example, the Fifth Circuit noted that when Congress initially passed the CWA in 1972, Congress recognized that there would be a time period during which dischargers would be discharging

pollutants without a permit because a permit was not yet available under the Act. Congress protected such dischargers from citizen suits for a specified time period, by providing that 33 U.S.C. § 1365 did not allow a citizen to bring an action against a person allegedly committing an unlawful act under § 301(a), 33 U.S.C. § 1311(a), (discharging without a permit) until July 1, 1973. 33 U.S.C. § 1365(f)(1). The legislative history states that Congress delayed the availability of a citizen suit based on an unlawful act under § 301(a) in order to give EPA and states time to issue all the permits required by the CWA. S. REP. NO. 414, 92ND CONG., 1ST SESS. (1971).

The Fifth Circuit also noted that EPA and the states have yet to achieve the goal of making all of the necessary permits available under the CWA. "Nevertheless, Congress has not amended the statute to account for the fact that, since July 1, 1973, numerous entities have violated § 1311(a) by discharging pollutants without a permit because EPA and the states have not issued the necessary permits." Cedar Point Oil, 73 F.3d at 560.

Congress provided a similar temporary reprieve in 33 U.S.C. § 1342(k), under which until December 31, 1974, discharges without a permit for which an application had been filed but the permit not issued, would not violate § 301. Again, the legislative history indicated that the provision was intended to provide a "liability shield" to dischargers for a limited time. Id. (citing *A Legislative History of the Water Pollution Control Act Amendments of 1972*, p. 274 (Environmental Policy Div., Congressional Research Serv. ed. 1973)). Again, "Congress has not extended the availability of this liability shield beyond its original expiration date, despite the fact that application for

permits are continually filed and many remain pending." Cedar Point Oil, 73 F.3d at 560.

The Eleventh Circuit's decision in this case directly conflicts with the Fifth Circuit's opinion in Cedar Point Oil. Because § 301(a) has previously been found by this Court to be the cornerstone of the CWA, the gaping hole created by the Eleventh Circuit in that cornerstone is an important matter of federal law. Petitioner therefore urges this Court to grant a writ of certiorari to review the Eleventh Circuit's erroneous interpretation of the CWA, and reverse its judgment.

III. The Eleventh Circuit's Alternative Holding Should Also Be Reviewed by this Court.

In an alternative ruling, the Eleventh Circuit also reversed the district court's injunction as invalid under Fed. R. Civ. P. 65(d), because it was not sufficiently specific. In successive rulings in the TRO, the preliminary injunction and the permanent injunction, the district court prohibited JMS from discharging any pollutants into the waters of the United States without a permit. The permanent injunction prohibited JMS from discharging polluted stormwater into waters of the United States if such discharges would be in violation of the CWA. Having held that it was the failure to have a permit for such discharges that caused the discharges to be in violation of the CWA, the district court had made it clear that JMS could comply with the injunction either by ceasing its discharges, or obtaining a permit for those discharges. JMS could clearly understand its obligations under the injunction. Combs v. Ryan's Coal Co., 785 F.2d 970, 978 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187 (1986). See also National

Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 435-438, 61 S. Ct. 693, 699-701 (1941). The Eleventh Circuit apparently wanted the district court to go further and mandatorily enjoin JMS to take specific acts. JMS, 78 F.3d at 1531. However, it is JMS's duty under the Act to take the necessary steps to cease its discharges of pollution, not the court's duty to tell it how to do so.

In any event, an injunction failing to meet Rule 65(d)'s specificity requirement should not necessarily be voided. Combs, 785 F.2d at 978. Instead, the Eleventh Circuit should have remanded the case to the district court to revise the wording of the injunction, or should have corrected the injunction. Id. See also Keyes v. School District No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 951 (1991); U.S. v. Holtzman, 762 F.2d 720, 766 (9th Cir. 1985). This Court should review the Eleventh Circuit's alternative reason for reversing the district court, and remand the case to the Eleventh Circuit for proceedings not inconsistent with this Court's rulings.

CONCLUSION

The Eleventh Circuit's decision is nothing short of revolutionary. It disregards clear statutory language and substitutes its own judgment for that of Congress. It ignores opinions from this Court, and from all other Circuit Courts of Appeal which have addressed the issue, all of which have found § 301(a) of the CWA to be an absolute prohibition of any discharge of any pollutants into any waters of the United States without a permit. This extreme example of judicial activism by the Eleventh Circuit in contravention of this Court's opinions

should be reviewed by this Court in order to ensure the continued integrity of the water pollution control program enacted by Congress in 1972 and enforced by all courts which have interpreted it ever since. Even limited to its facts, the panel decision contravenes the express purpose of the Act to eliminate the discharge of pollutants into the waters of the U.S. in order to make the waters safe for wildlife and recreation. 33 U.S.C. § 1251(a)(1)(2). Petitioner urges this Court to grant a writ of certiorari in order to restore the law to the state previously recognized by this Court: that there shall be no discharge of water pollution into U.S. waters except in compliance with a CWA permit.

Respectfully submitted,

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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

RELEVANT STATUTES/REGULATIONS RELIED UPON[1]

1. **33 U.S.C. § 1251(a)** -- "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

2. **33 U.S.C. § 1311(a)** -- "Except as in compliance with this section and sections ... 1342 ... of this Title, the discharge of any pollutant by any person shall be unlawful."

3. **33 U.S.C. § 1342(a)** -- "Except as provided in sections 1328 and 1344 of this Title, the administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this Title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this Title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the administrator determines are necessary to carry out the provisions of this chapter."

4. **33 U.S.C. § 1342(d)** -- "At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this Title, the governor of each state desiring to administer its own permit program for discharges into navigable waters within its jurisdiction

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[1] Only relevant portions included.

may submit to the administrator a full and complete description of the program it proposes to establish and administer under state law or under an interstate compact ... . The administrator shall approve each such submitted program unless he determines that adequate authority does not exist ..."

5. **33 U.S.C. § 1342(k)** -- "Compliance with a permit issued pursuant to this section shall be deemed compliance, ..., with section 1311, ... of this Title, ..."

6. **33 U.S.C. § 1362(6)** -- "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

7. **33 U.S.C. § 1362(14)** -- "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged."

8. **33 C.F.R. § 328.3(a)** -- "(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including

interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudslides, sandslides, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce ..."

9. **O.C.G.A. § 12-5-30(a)** -- "Any person who owns or operates a facility of any type or who desires to erect, modify, alter, or commence operation of a facility of any type which results or will result in the discharge of pollutants from a point source into the waters of the state shall obtain from the director a permit to make such discharge."

10 **DNR Rule 391-3-6-.15(a)2** -- "General Permit Requirements" -- "The director may issue a general permit . . ."

11. **DNR Rule 391-3-6-.15(b)2** -- "Requiring an Individual Permit" -- "The director may require any person authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the director to take action under this paragraph."

12. **DNR Rule 391-3-6-.15(c)** -- .... "All discharges into a storm water point source must either be covered by an individual permit or a permit issued to the owner or operator of that portion of the system that directly discharges into waters of the state."

TERENCE D. HUGHEY,
Plaintiff-Appellee,

v.

JMS DEVELOPMENT CORPORATION,
Defendant-Appellant.

TERENCE D. HUGHEY,
Plaintiff-Appellee,
Cross-Appellant,

v.

JMS DEVELOPMENT CORPORATION,
Defendant-Appellant,
Cross-Appellee.

Nos. 94-8402, 8855

United States Court of Appeals
Eleventh Circuit

[78 F.3d 1523]

April 1, 1996.

Landowner filed citizens suit under Clean Water Act (CWA) seeking to enjoin developer from discharging storm water run-off. The United States District Court for the Northern District of Georgia, No. 1:92-CV-2051-RHH, Robert H. Hall, Jr., issued permanent injunction, imposed fine, and

awarded landowner attorney fees and costs. Appeal was taken. The Court of Appeals, Owens, District Judge, sitting by designation, held that: (1) CWA's zero discharge standard for storm water runoff from construction activities in absence of National Pollutant Discharge Elimination System (NPDES) permit did not apply to developer when compliance was factually impossible, and (2) injunction prohibiting developer from discharging any storm water runoff was unenforceable "obey the law" injunction in absence of operative command capable of enforcement.

Orders vacated and injunction dissolved.

Carnes, Circuit Judge, filed opinion concurring in part.

Appeals from the United States District Court for the Northern District of Georgia.

Before ANDERSON and CARNES, Circuit Judges, and OWENS*, District Judge.

OWENS, District Judge:

I. INTRODUCTION

Appellant JMS Development Corporation ("JMS") is the developer of a 19.2-acre residential subdivision in Gwinnett County, Georgia. Appellee Terence D. Hughey ("Hughey") is a Gwinnett County homeowner admittedly opposed to all development in Gwinnett County, one of metropolitan Atlanta's fastest growing areas. Hughey's first effort to prevent development of JMS's residential subdivision was an unsuccessful suit in state court filed during the course of construction. After the subdivision had been completed, Hughey sued JMS in United States District Court alleging that JMS's completed subdivision was continuing to violate the Clean Water Act by allowing storm (rain) water runoff without

possessing a National Pollutant Discharge Elimination System ("NPDES") permit setting forth the conditions under which storm (rain) water could be discharged.

The undisputed evidence showed that JMS submitted its subdivision plans and specifications to Gwinnett County for approval and on March 31, 1992, obtained a county permit to begin construction. The undisputed evidence further showed that a Clean Water Act NPDES permit was not then available in the State of Georgia from the only agency authorized to issue such permits--Georgia's Environmental Protection Division. The district court nevertheless found that the Clean Water Act absolutely prohibited the discharge of any storm (rain) water from JMS's completed subdivision in the absence of an NPDES permit. Relying on this finding and rejecting the uncontroverted testimony that some storm (rain) water discharge beyond the control of JMS would naturally occur whenever it rained, the district court issued permanent injunctive relief pursuant to Federal Rule of Civil Procedure 65(d). The injunction ordered that JMS "not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place if such discharge would be in violation of the Clean Water Act."

The district court also fined JMS $8,500 for continuing violations of the Clean Water Act and awarded Hughey more than $115,000 in attorney fees and costs under 33 U.S.C. § 1365(d). From those orders and judgment of the district court, JMS appeals.

II. BACKGROUND

A. The Clean Water Act

In 1972 Congress passed the Clean Water Act ("CWA") amendments, 33 U.S.C. §§ 1251-1387, to remedy the federal water pollution control program which had "been inadequate in every vital aspect" since its inception in 1948. *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 203, 96 S. Ct. 2022, 2024, 48 L.Ed.2d 578 (1976). The amended CWA absolutely prohibits the discharge of any pollutant by any person, unless the discharge is made according to the terms of a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1311(a). This "zero discharge" standard presupposes the availability of an NPDES permit, allowing for the discharge of pollutants under the conditions set forth in the permit. *Id.* § 1342(a)(1). NPDES permits are usually available from the Environmental Protection Agency ("EPA"); however, 33 U.S.C. § 1342(c)(1) suspends the availability of federal NPDES permits once a state permitting program has been submitted and approved by the EPA. Thus, if a state administers its own NPDES permitting program under the auspices of the EPA, applicants must seek an NPDES permit from the state agency. *See* 33 U.S.C. § 1342(c)(1); *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L.Ed.2d 306 (1987).

On June 28, 1974, the State of Georgia was authorized by EPA to administer an NPDES program within its borders. The Georgia agency responsible for administration of that program is the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources. EPA-issued NPDES permits are thus not available in Georgia.

Even though the absolute prohibition in Section 1311(a) applied to storm water discharges, for many years the discharge

of storm (rain) water was a problem that the EPA did not want to address.[1] The EPA complained that administrative concerns precluded a literal application of the CWA's absolute prohibition--if the CWA applied to storm (rain) water discharges, the EPA would be required to issue potentially millions of NPDES permits. Years of litigation ensued when the EPA promulgated NPDES permit regulations exempting uncontaminated storm water discharges from the CWA. *See, e.g., Costle, supra* note 1.

The congressional response to this baffling situation was the Water Quality Act, Pub.L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of Title 33 U.S.C.), which amended the CWA to provide specifically that "storm water" discharges were within the CWA's proscription. *See* 33 U.S.C. § 1342(p). Because of the administrative nightmare presented by the inclusion of storm (rain) water discharges, Congress chose a phased-in approach. "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992).

The phased-in approach established a moratorium until October 1, 1992, on requiring permits for most storm water discharges. *Id.*; Water Quality Act, § 402(p), 33 U.S.C. § 1342(p). However, "discharge[s] associated with industrial

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[1]Under the CWA, the term "pollutant" is inclusive of "rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). When rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing, it falls within this description. *See, e.g., National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir. 1977); 40 C.F.R. § 122.2 (defining pollutant).

activity"[2] were excepted from this moratorium. Water Quality Act, § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). Section 402(p)(2)(B) required the EPA no later than February 4, 1989, to establish regulations setting forth permit application requirements for industrial storm water discharges. Those seeking such permits were to file an application no later than February 4, 1990, and permit applications were to be rejected or accepted by February 4, 1991. *Id.*

EPA failed to meet the statutory timetable, so it extended the deadline for submitting a permit application until October 1, 1992. The Natural Resources Defense Council ("NRDC") sued the EPA for granting this extension. The Ninth Circuit Court of Appeals granted NRDC's request for declaratory relief, but denied injunctive relief, stating the "EPA will duly perform its statutory duties." *NRDC v. EPA*, 966 F.2d at 1300. On September 3, 1992, the EPA confirmed the Ninth Circuit's faith by issuing its final general permits for storm water discharges associated with industrial activity; applicants were to submit their request for a permit by no later than October 1, 1992.

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[2]Under EPA guidelines, "storm water discharge associated with industrial activity" is inclusive of construction activity, which is in turn defined as "clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." 40 C.F.R. § 122.26(b)(14)(x). This regulation, to the extent it sought to exempt from the definition of "industrial activity" construction sites of less than five acres, was invalidated on the grounds that it was arbitrary and capricious. *NRDC v. EPA*, 966 F.2d 1292, 1305-06 (9th Cir. 1992). Even so, the regulation still provides that industrial activity is inclusive of construction.

Since a state agency's action in advance of that taken by the EPA might be disapproved as inconsistent with the EPA's eventual position, Georgia EPD has always followed the EPA's lead in the promulgation of NPDES permits. *See generally* Georgia EPD's Amicus Brief, at 5. Consistent with this approach, Georgia EPD began the public notice portion of the storm (rain) water discharge permit promulgation process only after the EPA had acted. On September 23, 1992, less than one month after the EPA had issued its general permits, Georgia EPD issued public notice of its intent to issue two general permits, one of which would cover storm water discharges from construction activities involving land-disturbing activities of five acres or more. An affidavit from the section chief of Georgia EPD's Water Protection Branch summarized the state of the law in Georgia up to that time: "[N]o NPDES program for issuing NPDES permits has been in place [in Georgia] for storm water runoff from construction activities."

B. The JMS Residential Subdivision

In early 1992-when NPDES permits covering storm (rain) water were not available in Georgia--JMS planned to develop its 19.2 acre residential subdivision and for that purpose submitted its plans and specifications to Gwinnett County. In developing these plans and specifications, JMS hired a firm of consulting engineers, who were to supervise the design and control of sedimentation control measures and help ensure that JMS remained in compliance with relevant pollution control requirements.

On March 31, 1992, JMS received a permit from Gwinnett County authorizing it to conduct land-disturbing

activities.[3] In accordance with requests from state and county officials, JMS spent more than $30,000 installing state of the art sedimentation control devices, including silt fences, check dams, vegetation, sloping, and a sedimentation retention basin. The erosion and sedimentation control measures met or exceeded Gwinnett County's requirements.

Prior to beginning construction, JMS had done everything possible to comply with the legal requirements of building a small residential subdivision. On the county level, County Inspector George Michael Fritcher deposed that JMS was in compliance; at the state level, David Word, Chief of EPD's Water Protection Branch, stated that EPD would not (could not) have done anything with respect to an NPDES permit for storm water discharges even if JMS had applied for one prior to beginning the development; and at the federal level resort to the EPA was foreclosed to JMS because, as noted, Georgia's NPDES program exists in lieu of the federal NPDES program.

With Gwinnett County's blessing, JMS began to clear, grade, and grub the property for the construction of streets, gutters, and storm sewers. JMS channeled its discharge of rain water as dictated by the county permit requirements. The discharges that occurred, as noted by the district court, were

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[3]According to David Tucker, Development Review Manager for Gwinnett County, this permit served as "authorization for land-disturbing activity as required by the Development Regulations of Gwinnett County [, which] has the authority to administer [Georgia's] Soil Erosion and Sedimentation Control Act of 1975 in Gwinnett County. As part of this permitting procedure, JMS Development Corporation submitted a soil erosion and sedimentation control plan which was approved by the Gwinnett County Planning and Development." *See also* Billew Affidavit; Ballard Affidavit (exh. A).

minimal and posed "no threat to human health." Further, much of the damage caused by the discharges would have been "reversed with the passage of a relatively short amount of time." Within this 19.2-acre subdivision, approximately 4.64 acres were disturbed by actual construction of storm sewers, curb, guttering, and streets.

Once all subdivision construction had been completed and the storm sewers, curbing, gutting, and streets had been dedicated or conveyed to Gwinnett County, a plat of the completed subdivision showing approval by Gwinnett County's various agencies was recorded in the land records of Gwinnett County on August 6, 1992. JMS was from this point forward engaged in no further construction or land disturbing activities.

C. Hughey's Clean Water Act Civil Action

On August 28, 1992, Hughey sued JMS under the citizen's suit provision of the Clean Water Act, 33 U.S.C. § 1365,[4] alleging that JMS had violated the CWA by discharging storm (rain) water from a "point source" on its property into "the waters of the United States" without an NPDES permit. *See* 33 U.S.C. §§ 1311, 1342. Hughey alleged that JMS's discharges of storm (rain) water were in association with industrial activity. *See* 40 C.F.R. § 122.26(b)(14)(x) (industrial activity includes construction, which in turn encompasses

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[4]Section 1365(a) authorizes any citizen to "commence a civil action on his own behalf--(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . . " The section further provides that "effluent standard or limitation" is inclusive of "an unlawful act under subsection (a) of section 1311 of this title." Section 1311(a) makes it unlawful to discharge any pollutant without an NPDES permit.

clearing, grading, and grubbing). Because JMS's construction activities were considered "industrial" by EPA *regulations*, Hughey contended that JMS was required to have an NPDES permit. *See* Water Quality Act, Section 402(p)(2)(B) (establishing permit deadline for discharges associated with industrial activities). To the extent JMS had discharged without a permit, Hughey argued that JMS was subject to the "zero discharge" standard imposed by Section 1311(a). Hughey's complaint sought a declaratory judgment that JMS was liable under the CWA, as well as injunctive relief against JMS in several forms. Contemporaneously with his complaint Hughey filed a motion for a temporary restraining order ("TRO"), which the court granted after hearing from both sides on August 31, 1992.

Hughey's factual allegations were that JMS's activities caused two watercourses to become muddied during rainfall events.[5] The first of these watercourses is a small stream[6] that originates on JMS's property and traverses neighboring land for close to nine hundred (900) feet before emptying into the Yellow River, which is the second flow of water involved. Twenty-eight hundred (2800) feet below the stream's

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[5]The court notes as an aside that a question of fact existed concerning the degree to which JMS was responsible for increased turbidity levels in these two watercourses during rainfall events. This pivotal question of fact was not decided by a jury as demanded by JMS, but rather by the district judge. *See infra* note 13.

[6]At least one expert at trial described the stream as a wet weather flow, and indeed, JMS's consulting engineer stated in his affidavit that United States Geological Survey Maps do not even delineate this unnamed tributary as a stream at all. JMS described the stream as ranging from three to seven feet in width.

confluence with the Yellow River lives Mr. Hughey, who owns and resides on land abutting the Yellow River.

JMS initially responded to the complaint with a motion to dissolve the TRO and a motion for summary judgment. JMS conceded that rain water had run off its property and that it did not have an NPDES permit authorizing discharges under the CWA. However, JMS showed that no such permit was available from any government agency and that it had in fact obtained every permit that was available prior to initiating construction.[7] JMS then answered the complaint denying liability under the CWA and demanding a jury trial.

On November 9, 1992, the district court denied JMS's motions to dissolve the TRO, to dismiss the complaint, and for summary judgment. The district court granted Hughey's motion for preliminary injunctive relief, finding that JMS was

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[7]The consulting engineers hired by JMS, in addition to seeking (and obtaining) county land disturbing permits, eventually applied for an NPDES permit from Georgia EPD on September 28, 1992, after Hughey had filed this action. Georgia EPD responded by saying no action would (could) be taken with respect to the notice of intent. David Word, Chief of the Water Protection Branch of Georgia EPD, commented on the effect of JMS's application:

> EPD has received a notice of intent to comply with the general permit from JMS Development Corporation for its subdivision in Gwinnett County, Georgia. No action will be taken on this notice of intent until a general permit becomes effective. Therefore, at this time [10/8/92], *no further action is required or necessary on the part of JMS Development Corporation to be authorized lo discharge storm water into waters of the State of Georgia from the subject property.*
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> Word Aff., at ¶ 10 (emphasis supplied). Georgia EPD simply did not have a permit to issue, either before, during, or after the subdivision's development. JMS presented this evidence to the district court in its motion to dismiss.

potentially liable for storm (rain) water discharges made subsequent to October 1, 1992. The preliminary injunction prohibited JMS from "discharg[ing] storm water into waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place, without a National Pollutant Discharge Elimination System permit permitting such discharge."

More than one year later, on December 15, 1993, the district court found JMS liable under the CWA for storm (rain) water discharges into the stream on thirteen dates in 1992-June 8, 14, 30; July 1, 2; August 13, 16; September 4, 5, 27, 28; and October 4, 8. The court further found that JMS once, on June 8, 1992, discharged storm water into the Yellow River itself These violations according to the district court were continuing (albeit minimal), see Order of 2/24/94, at 4, 8, and became the basis for the court's permanent injunction several months later, which issued on February 24, 1994.[8] Defendant in that order

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[8]Although Georgia EPD stated in its amicus brief to the district court on October 27, 1992, that it expected to issue general NPDES permits covering storm (rain) water discharges by December 1992, such a permit was still not available as of the date on which the district court granted permanent injunctive relief.

Georgia EPD did issue its general permit; however, Mr. Hughey appealed the issuance of that permit in a separate action to the Board of Natural Resources for the State of Georgia, alleging both procedural and substantive defects in the general permit.

The administrative law judge remanded the permit to the Director of Georgia EPD because of Georgia EPD's failure to comply with procedural rules. In addition, the ALJ noted that a remand was also necessary for the Director to consider turbidity levels for storm (rain) water discharges. Due to Mr. Hughey's appeal, there was still no NPDES permit available in Georgia for the discharge of storm (rain) water when the district court entered the permanent injunction.

was instructed not to discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act.* (emphasis supplied). On account of JMS's specific violations of the CWA, the district court required JMS to pay $8,500 in civil penalties to Hughey.[9] Lastly, the court ordered JMS to pay Hughey more than $115,000 in attorney fees and costs pursuant to 33 U.S.C. § 1365(d).

III. ISSUES ON APPEAL

JMS argues that the broad generalized language of the injunction, which in effect says nothing more than to "obey the law," is violative of the standard of specificity required by Federal Rule of Civil Procedure 65(d). JMS's second contention is that it should not be punished for failing to secure an NPDES permit when no such permit was available. Finally, JMS objects to the award of attorney fees and costs.[10] JMS has not objected, however, to the fact that it did not receive a jury trial on the question of liability.

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[9]Hughey concedes that requiring payment of civil penalties to him was clear error by the district court. Civil penalties under the Clean Water Act can only be paid to the United States Treasury. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990).

[10]Hughey filed a cross appeal complaining that $115,000 was an insufficient award. When JMS was forced into bankruptcy, the cross appeal was automatically stayed under 11 U.S.C. § 362. *See* Appellee's Brief, at xiv n. 1. For the reasons that follow, we need not consider the merits of that appeal.

IV. STANDARD OF REVIEW

[1] Although the grant of permanent injunctive relief is generally reviewed for an abuse of discretion, "if the trial court misapplies the law we will review and correct the error without deference to that court's determination." *Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir. 1993), *cert. denied*, -- U.S.--, 114 S.Ct. 696, 126 L.Ed.2d 663 (1994). *See also Guaranty Fin. Svcs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir. 1991) ("if the court misapplied the law in making its decision [to grant the preliminary injunction] we do not defer to its legal analysis"). We review questions of law de novo. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995).

V. DISCUSSION

A. Liability Under the Clean Water Act

As noted, the CWA imposes a "zero discharge" standard in the absence of an NPDES permit. 33 U.S.C. § 1311(a). The question is whether Congress intended for this zero discharge standard to apply in the circumstances of this case.

[2] In interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results. *United States v. X-Citement Video, Inc.*, ___U.S. ___, ___, 115 S. Ct. 464, 468, 130 L.Ed.2d 372 (1994); *Towers v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995). Courts will not foolishly bind themselves to the plain language of a statute where doing so would "compel an odd result." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S. Ct. 1981, 1984, 104 L.Ed.2d 557 (1989). For, "'it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have

some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55, 109 S. Ct. 2558, 2567, 105 L.Ed.2d 377 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 66 S. Ct. 193, 90 L.Ed. 165 (1945)). *Cf Green v. Bock Laundry Mach. Co.*, 490 U.S. at 527-30, 109 S. Ct. at 1994-95 (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the [language] . . . that avoids this consequence . . . ").

Our jurisprudence has eschewed the rigid application of a law where doing so produces impossible, absurd, or unjust results. "[I]f a literal construction of the words of a statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that result." *United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L.Ed. 226 (1892)); *see also United States v. Castro*, 837 F.2d 441, 445 (11th Cir. 1988). "[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed [the purpose of the act], rather than the literal words." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S. Ct. 852, 857, 15 L.Ed.2d 827 (1966) (internal quotation marks omitted).

As is often the case, the legislature will use words of general meaning in a statute,

> words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding

> its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Public Citizen, 491 U.S. at 454, 109 S. Ct. at 2566-67 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L.Ed. 226 (1892)) (emphasis supplied). Thus, this court has found that

> [g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Zwak v. United States, 848 F.2d 1179, 1183 (11th Cir. 1988) (quoting *Sorrells v. United States*, 287 U.S. 435, 447, 53 S. Ct. 210, 214, 77 L.Ed. 413 (1932)). For instance, common sense says that a law making it a felony for a prisoner to escape from jail "does not extend to a prisoner who breaks out when the prison is on fire--'for he is not to be hanged because he would not stay to be burnt.'" *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487, 19 L.Ed. 278, 280 (1869).

[3] In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. Congress could not have intended a strict application of the zero discharge standard in section 1311(a) when compliance is factually impossible. The evidence was uncontroverted that whenever it rained in Gwinnett County

some discharge was going to occur; nothing JMS could do would prevent all rain water discharge. George Fritcher, the county inspector charged with monitoring JMS's compliance with Gwinnett County's development permit, deposed that it was simply impossible to stop sediment from leaving the subdivision when there was a rainfall event. "[Z]ero discharge of storm water will never *be achieved* because rainfall must find its way back into the streams and rivers of this state." Georgia EPD Amicus Brief, at 13 (emphasis supplied). Doug Ballard, president of JMS, similarly testified on cross-examination by Hughey's counsel that he could not stop the rain water that fell on his property from running downhill, and that nobody could. The rain that fell on his property "is designed to go down those curbs and designed to go down those pipes and unless you go out there and collect it in your hand some way or other it's going to have to go somewhere."

Moreover, JMS obtained from Gwinnett County a development permit that was issued pursuant to the County's authority under Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("SESCA"), O.C.G.A. §§ 12-7-1 *et seq.* That Georgia statute, like the CWA, limited storm water discharges during the applicable period. *See* O.C.G.A. § 12-7-6(18) (1992). Moreover, Georgia EPD's proposed standards for a general NPDES permit for storm water discharges are similar to the standards for storm water discharges contained in SESCA. David Word, the Chief of the Water Protection Branch of Georgia EPD, testified by affidavit that "the general NPDES permit proposed for storm water runoff from construction activities . . . will require permittees to perform certain erosion and sedimentation control practices, [which are] currently required under authority of the Erosion and Sedimentation Control Act of 1975." Accordingly, the fact that

JMS was issued a development permit by Gwinnett County suggests that JMS would have been able to obtain an NPDES permit from Georgia EPD, had such a permit been available.

The facts of this case necessarily limit our holding to situations in which the storm water discharge is minimal, as it was here. The district court found that JMS's "discharges pose no threat to human health, and that much of the damage [caused by such discharges] will be reversed with the passage of a relatively short amount of time."

This was not a case of a manufacturing facility that could abate the discharge of pollutants by ceasing operations. Nor did the discharger come to court with unclean hands: JMS made every good-faith effort to comply with the Clean Water Act and all other relevant pollution control standards. The discharges were minimal, and posed no risk to human health. In sum, we hold that Congress did not intend (surely could not have intended) for the zero discharge standard to apply when: (1) compliance with such a standard is factually impossible; (2) no NPDES permit covering such discharge exists; (3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal. *Lex non cogit ad impossibilia*: The law does not compel the doing of impossibilities. BLACK's LAW DICTIONARY 912 (6th ed. 1990).

Practically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that. Under these circumstances, denying summary judgment to JMS was an error of law. *Cf Menzel v. County Utilities Corp.*, 712 F.2d 91, 95 (4th Cir. 1983) (refusing to impose CWA liability for discharges during period in which effectiveness of NPDES permit was stayed by state court, since

subjecting discharger to liability would serve no statutory purpose).

B. The Permanent Injunction-Federal Rule *of* Civil Procedure 65

In addition to the fact that an injunction based upon an erroneous conclusion of law is invalid, *see United States v. Jefferson County*, 720 F.2d 1511, 1520 n. 21 (11th Cir. 1983), Rule 65(d) of the Federal Rules of Civil Procedure mandates dissolution of the injunction.

Rule 65(d) sets forth the standards of specificity that every injunctive order must satisfy.

> Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .

Rule 65 serves to protect those who are enjoined

> by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order. As a result, one of the principal abuses of the pre-federal rules practice--the entry of injunctions that were so vague that defendant was at a loss to determine what he had been restrained from doing--is avoided. The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.

11A WRIGHT, MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2955 (1995) (footnotes omitted). In addition to giving those enjoined "fair and precisely drawn notice of what the injunction actually prohibits," *Epstein Family Partnership v. K-Mart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994), the specificity requirement of Rule 65(d) serves a second important function:

> Unless the trial court carefully frames it orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. We can hardly begin to assess the correctness of the judgment entered by District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.

Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 715, 38 L.Ed.2d 661, 664 (1974).

[4] Consistent with the two foregoing purposes, appellate courts will not countenance injunctions that merely require someone to "obey the law." *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 897-98 (5th Cir.), cert. denied, 439 U.S. 835, 99 S. Ct. 118, 58 L.Ed.2d 131 (1974).[11] "Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement . . . does not give the restrained party fair notice of what conduct will risk contempt." *Epstein Family Partnership, supra*. Because of the

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[11]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

possibility of contempt, an injunction "must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Id.* (internal quotation marks omitted). An injunction must therefore contain "an operative command capable of 'enforcement.'" *Longshoremen's Ass'n. v. Maine Trade Ass'n.*, 389 U.S. 64, 73-74, 88 S.Ct. 201, 206-07, 19 L.Ed.2d 236, 244 (1967). *See also United States Steel Corp. v. United Mine Workers*, 598 F.2d 363, 368 (5th Cir. 1979) (party subject to contempt proceeding may defend on basis that compliance was not possible).

Here, the district court's order granting permanent injunctive relief only stated:

> Defendant shall not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act.*

(emphasis supplied).

[5] Not only was this an "obey the law" injunction, it was also incapable of enforcement as an operative command. The court's order merely required JMS to stop discharges, but failed to specify how JMS was to do so. Discharges, though not defined by the order, occurred only when it rained, and any discharge was a violation of the order. Rain water ran into the subdivision's government approved streets and storm sewers; then into the small stream that started on the subdivision property; on into a tributary stream; and eventually into the Yellow River. Was JMS supposed to stop the rain from falling? Was JMS to build a retention pond to slow and control

discharges? Should JMS have constructed a treatment plant to comply with the requirements of the CWA?

The injunction's failure to specifically identify the acts that JMS was required to do or refrain from doing indicates that the district court--like the CWA, the EPA, Georgia EPD, and Mr. Hughey--was incapable of fashioning an operative command capable of enforcement. As such, we must vacate this "obey the law" injunction.[12]

C. Award of Attorney Fees and Costs

[6] A court issuing any final order in a Clean Water Act citizen's suit "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). A prevailing or substantially prevailing party is one who prevailed "in what the lawsuit originally sought to accomplish." *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 887 (9th Cir. 1993).

The district court here awarded Hughey more than $115,000 in attorney fees and costs. However, for the reasons stated above Hughey's citizen suit has not accomplished its original objective. Hughey is not a prevailing or substantially

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[12]Hughey contends that the injunction contains the requisite specificity by reference to the prior orders granting injunctive-type relief, i.e., that the permanent injunction merely continued in place what previous orders had already done. *See, e.g., Keyes v. School Dist. No. 1., Denver, Colo.*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 951, 112 L.Ed.2d 1040 (1991). We doubt that such an exception exists, unless in very rare, exceptional cases. A person enjoined by court order should only be required to look within the four corners of the injunction to determine what he must do or refrain from doing. That was not the case here.

prevailing party and is thus not entitled to an award of attorney fees and costs. *See Save Our Community v. United States EPA*, 971 F.2d 1155, 1167 (5th Cir. 1992) (where district court erred in finding defendant liable under the CWA, the award of attorney fees based thereon was also inappropriate).

VI. CONCLUSION

Imposing liability upon JMS under these circumstances was a miscarriage of justice. It is inconceivable that Congress intended, let alone foresaw, a result such as this under the Clean Water Act. Environmentally safe waters are of vital importance to this nation as is evident from the fact that Congress enacted an entire statutory scheme to address the problem. Nevertheless,

> [t]he inability of [Georgia EPD] to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of [the complete unavailability of an NPDES permit], or society must tolerate slippage of an interim pollution abatement deadline.

Republic Steel Corp. v. Train, 557 F.2d 91, 94 (6th Cir. 1977). Balancing these concerns on the basis of the record before us, we refuse to place the burden on JMS.

The orders imposing statutory penalties and attorney fees and costs were premised on the finding that JMS was

liable under the CWA. Because we REVERSE this finding of liability, those orders are VACATED.

The injunctive relief issued by the district court on February 24, 1994, was improper not only because it was premised on an error of law, but also for the alternative reasons that the injunction lacked the specificity required by Rule 65(d), and compliance with its terms was impossible. Accordingly, the permanent injunction is DISSOLVED.[13]
IT IS SO ORDERED.

CARNES, Circuit Judge, concurring:

I concur in all of the Court's holdings and opinion except for Part V.B. What the Court says there about Rule

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[13]Because JMS has not raised the jury trial question, we will not address it now for the first time, although it would appear to require summary reversal on the issue of liability. *See Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831, 95 L.Ed.2d 365 (1987) (defendants under the CWA have Seventh Amendment right to a jury trial on questions of liability).

Because we have determined that JMS cannot be liable no matter who files the complaint, we do not discuss JMS's challenge to the propriety of the citizen's suit. *See, e.g., Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L.Ed.2d 306 (1987) (citizen suits should be interstitial, not intrusive); *Northwest Environmental Advocates v. Portland*, 11 F.3d 900, *vacated*, 56 F.3d 979 (9th Cir. 1995) (initially deciding citizen suits were unauthorized when challenging water quality standards in an NPDES permit, latter opinion found citizen suits were not so limited); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1014 n. 11 (3rd Cir. 1988) (refusing to decide whether scope of citizen suits was limited).

We also decline to address the issues of Hughey's standing, JMS's substantive due process challenge, and the fee award's lodestar calculation, as they are rendered unnecessary by the holding herein.

65(d) and "obey the law" injunctions may be correct, or it may be incorrect, but it is certainly dicta. Given our holding that the plaintiff in this case is not entitled to any relief at all, it matters not whether the relief he was given would have been in proper form if he had been entitled to some relief.

Date: April 1, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8402

TERENCE D. HUGHEY,
Plaintiff-Appellee,
v.
JMS DEVELOPMENT CORPORATION,
Defendant-Appellant.

No. 94-8855

TERENCE D. HUGHEY,
Plaintiff-Appellee,
Cross-Appellant,
v.
JMS DEVELOPMENT CORPORATION,
Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

[89 F.3d 857]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion April 1, 11th Cir., 1996, F.2d).

Before: ANDERSON and CARNES, Circuit Judges, and OWENS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[signed]

UNITED STATES CIRCUIT JUDGE

*Honorable Wilbur D. Owens, Jr., U.S. District Judge for the Middle District of Georgia, sitting by designation.

Date: June 17, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION FILE
vs.	)	
	)	NO. [1:92-cv-2051-RHH]
JMS DEVELOPMENT	)	
CORPORATION,	)	
	)	
Defendant.	)	
	)	

TEMPORARY RESTRAINING ORDER

The above and foregoing Verified Complaint having been read and considered, and the Plaintiff's Motion for Temporary Restraining Order having been considered and heard, and the Plaintiff having shown that immediate and irrevocable injury will result to the Plaintiff if such a restraining order is not issued, and it appearing to the Court that a proper case has been made out for a temporary restraining order, it is hereby ordered and adjudged:

1.

That a temporary restraining order is hereby issued to defendant JMS Development Corporation and any of its successors, assigns, successors in interest, subsidiaries or affiliates, restraining them from discharging sand, silt, asphalt

runoff and other pollutants into any waters of the United States without a permit. ... Said defendant is so restrained for a period of ten (10) days after entry of this order.

2.

That the parties appear before the Court on the 31 day of August, 1992 at 11:45 o'clock A.m. for a hearing on the preliminary injunction to be held in Room in the Richard B. Russell Federal Building.

SO ORDERED this 31 day of Aug, 1992 at 12:05 o'clock P.m.

[signed]
Judge, United States District Court, Northern District of Georgia, Atlanta Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	CIVIL ACTION NO.
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
Defendant.	)	

ORDER

Upon consideration by the court of the above-entitled action,

IT IS HEREBY ORDERED that the court's temporary restraining order dated August 31, 1992, is continued for a period of 60 days.

FURTHER, parties are to appear before this court on November 5, 1992, at 9:30 a.m., for a hearing to be held in Courtroom 2108 on the motion for preliminary injunction.

SO ORDERED this 11th day of September, 1992.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on (1) Defendant's Motion to Dissolve the TRO [14], (2) Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment [16], (3) Plaintiff's Motion for a Preliminary Injunction [1], and (4) Plaintiff's Motion to Hold Defendant in Contempt of Court [13]. The Court has jurisdiction over the case pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1365(a), and 28 U.S.C. § 1361. The Court DENIES Defendant's Motion to Dissolve the TRO, DENIES Defendant's Motion to Dismiss, GRANTS Plaintiff's Motion for a Preliminary Injunction, and DENIES Plaintiff's Motion to Hold Defendant in Contempt of Court.

BACKGROUND

A. Facts.

Defendant, JMS Development Corporation, is a Georgia corporation engaged in the development of a 19.2 acre

subdivision known as Rivercliff Place ("the subdivision" or "the property"), in Gwinnett County Georgia. Plaintiff, Terence Hughey, is a resident of Gwinnett County, and owns property in the county, adjacent to the Yellow River, and topographically downhill from the subdivision. Plaintiff claims that Defendant is violating the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. ("the CWA"), by discharging from the subdivision, without a permit, sedimentation collected in rain-water runoff, that travels off of the property, into a stream, and into the Yellow River.

The subdivision contains 50 lots for the construction of residential homes. Forty-six of these lots are currently owned by Defendant. Defendant has sold the remaining four lots to builders who have begun constructing homes on each. No construction has begun on Defendant's forty-six lots. In the Spring of 1992, Defendant began its development of the subdivision by clearing, grubbing and grading an area of the property for the construction of three streets, with related curbing, gutters and storm sewers. Defendant alleges that its street construction involved the disturbance of approximately 4.64 acres of land. Defendant's Motion to Dissolve, p. 2. Plaintiff concedes this fact, but argues that Defendant's total land disruption involved more than five acres. On August 6, 1992, Defendant dedicated the streets, curbing, gutters and storm sewers to Gwinnett County, and the county accepted same.

Defendant alleges that it has obtained all applicable permits and approvals necessary from Gwinnett County. See Affidavit of David Tucker, ¶ 3. on March 31, 1992, prior to commencing its clearing, grubbing and grading activities, Defendant obtained a Gwinnett County development permit ("Gwinnett permit"), authorizing it to engage in land-disturbing

activity in the subdivision, and permitting it, under state law, to discharge certain amounts of stormwater[1]. Gwinnett County issued the Gwinnett permit pursuant to its authority to administer Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("the SESCA") within the physical confines of Gwinnett County. See O.C.G.A. § 12-7-8.

The SESCA restricts the concentration of silt that can be discharged in stormwater in Georgia. The Act prohibits stormwater discharges that are more than "50 nephelometric turbidity units ["NTUs"] higher than the turbidity level of the receiving stream immediately upstream from the stormwater runoff discharge at the time of such discharge . . . . of O.C.G.A. § 12-7-6(18). Plaintiff presented evidence at the October 16, 1992 hearing that Defendant had violated the SESCA's fifty NTU limitation. See Testimony of Dr. Wade Nutter. The record regarding Defendant's compliance with the CWA is sufficient for the Court to rule on the parties' motions, and any possible findings as to Defendant's compliance with the SESCA would not warrant a different outcome. Nor is it necessary at this stage in the litigation to rule on Defendant's compliance with the SESCA. The Court's discussion, therefore, will focus primarily on Defendant's compliance with the CWA.

Defendant, however, does not have a National Pollutant Discharge Elimination System ("NPDES") stormwater permit, which is required in order to exempt oneself from the CWA's federal prohibition on discharging stormwater. Defendant's failure to obtain an NPDES permit is due, at least in part, to the

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[1]Under both federal and state law, the term "stormwater" is used for water that contains sedimentation from land disturbing activities

State of Georgia's failure to make NPDES stormwater permits available to potential applicants (see infra).

On August 28, 1992, Plaintiff filed a Complaint with this Court, alleging that Defendant had violated the CWA by allowing stormwater to run off of its property, and into the Yellow River, without possessing an NPDES stormwater permit. [1]. Plaintiff requested that the Court enjoin Defendant, and award damages. Defendant alleges that it ceased all land-disturbing activities on the property prior to Plaintiff's complaint. Defendant's Motion to Dissolve, p. 5. Defendant asserts also that it has expended over $30,000 installing "state of the art" erosion and sediment control structures pursuant to instruction of Gwinnett County and Georgia state officials. Defendant's Motion to Dissolve, pp. 4, 5. The structures include: siltation fencing, check dams, grassing, sloping, and a sediment retention structure. Id.; Woodall Affidavit, ¶ 3. These structures, however, are designed only to minimize release of stormwater, and, accordingly, stormwater continues to leave the subdivision during rainfall and enter the Yellow River.

On August 31, 1992, the Court issued a Temporary Restraining Order, restraining Defendant from "discharging sand, silt, asphalt runoff and other pollutants into any waters of the United States without a permit." [5-1]. On September 11, 1992, the Court extended the TRO for 60 days. [11-1].

On October 13, 1992, Plaintiff filed a Motion to Hold Defendant in Contempt of Court for having discharged stormwater, in violation of the TRO, on September 4, 5, 27, 28, and October 4, and 8, 1992. Plaintiff's Contempt Motion, pp. 1-2. [13]. In its motion, Plaintiff requests the Court to fine Defendant $25,000 for each day of violation. Id. at p. 2. On October 15, 1992, Defendant filed a Motion to Dissolve the

TRO. [14]. The Court heard oral arguments on both motions on October 16, 1992. Also on October 16, 1992, Defendant filed a Motion to Dismiss Plaintiff's complaint, or in the alternative, to grant Defendant Summary Judgment. [16].

B. The Clean Water Act, and the NPDES Permitting Program.

In 1972, Congress amended the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Pursuant to this objective, the Act prohibits the discharge of any pollutants from a "point source[2]," except in accordance with standards promulgated in permits issued under other sections of the Clean Water Act. 33 U.S.C. § 1311(a). The permitting scheme requires that persons seeking to so discharge pollutants must obtain an NPDES permit, either from the Environmental Protection Agency ("the EPA"), or from their respective state environmental agency if the EPA has delegated authority to the state to issue the permits. 33 U.S.C. § 1342.

The Act also authorizes individuals to commence suits on their own behalf ("citizen suits"). 33 U.S.C. § 1365(a). A person may bring a citizen suit against "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the Act]." Id. The term "effluent standard or limitation" includes "any restriction established by a State or the Administrator on quantities, rates, and concentrations of [covered discharges]." Id. § 1362(11). Thus, Plaintiff is

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[2]The CWA defines "point source" as "any discernable, confined and discreet conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged. 33 U.S.C. § 1362 (14).

authorized to bring a citizen suit against Defendant for violating either the CWA zero-discharge-without-a-permit limitation, or the SESCA's fifty NTU limitation.

On June 28, 1974, the State of Georgia received authority to administer the NPDES program within its borders. Pursuant to this grant of authority, the CWA is now implemented in Georgia by the Georgia Water Quality Control Act ("the GWQCA"), O.C.G.A. § 12-5-20 et seq. Georgia, in turn, has delegated the authority to issue NPDES permits to the Environmental Protection Division of the Georgia Department of Natural Resources ("the EPD"). O.C.G.A. § 12-5-20.

The United States Environmental Protection Agency has declared stormwater runoff to be "the leading [and the] largest remaining, virtually unaddressed source of water pollution [in the United States]." EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT in EPA Environmental News (September 3, 1992). See also 55 Fed. Reg. 47,991; Natural Resources Defense Council v. U.S. EPA, 966 F.2d 1292, 1295 n. 3 (9th Cir. 1992). The Clean Water Act, however, did not explicitly address stormwater discharges until it was amended in 1987. In that year, Congress enacted the Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.), and created a new regulatory scheme for stormwater discharges. See 33 U.S.C. § 1342(p). Congress amended the regulatory scheme, in 1991, to its present form. Pub. L. No. 102-240, § 1068, 105 Stat. 2007.

Section 1342 (p) prohibited the EPA, or states to which NPDES permitting authority had been delegated, from requiring NPDES permits prior to October 1, 1992 for stormwater discharges. 33 U.S.C. § 1342 (p)(1). The section also excepted from the moratorium discharges "associated with

industrial activities." Id. § 1342(p)(2)(B). Federal regulations define "industrial activities" as construction involving five or more acres. 40 CFR 122.26(b)(14)(x). Thus, prior to October 1, 1992, a person did not violate the CWA by discharging stormwater without an NPDES permit, so long as the discharge was not associated with construction involving five or more acres of land. Subsequent to October 1, 1992, and continuing today, a person does violate the CWA by discharging stormwater without an NPDES permit, regardless of with what size or type of land the discharge is associated.

The Water Quality Act also imposed deadlines prior to October 1, 1992 for the EPA, or states with delegated authority, to establish NPDES permit application requirements, and to accept and respond to applications. 33 U.S.C. § 1342(p)(4). The EPA, however, failed to comply with these deadlines. Not until September 9, 1992 did the EPA make available a "general NPDES permit" to cover stormwater discharges falling under § 1342(p)(2)(B). 57 Fed. Reg. 41,176 - 41,233 (September 9, 1992). The EPD, apparently in an effort "to be consistent with the federal program," has consistently waited until after the EPA has acted before implementing each step of its permit authorization process. See EPD's Amicus Curiae Brief, p. 8. On September 23, 1992, eight days before 33 U.S.C. § 1342(p)'s moratorium expired, the EPD issued a public notice of its proposal to issue two general NPDES permits for stormwater discharges. Georgia Department of Natural Resources, Public Notice No. 92-16 (appended to EPD's Amicus Curiae Brief at Exhibit 5). The first proposed permit -General Permit No. GAR100000- will authorize stormwater discharges "associated with industrial activity." See EPD's Amicus Curiae Brief, Exhibit 6. The second proposed permit -General Permit No. GAR100000- will authorize stormwater

discharges associated with "construction activities involving land disturbing activities of five or more acres." See Id. The EPD testified at the October 16, 1992 hearing on Plaintiff's Motion to Hold Defendant in Contempt of Court that it anticipated the permits would be available by the end of 1992. It is important to note, however, that neither proposed permit will cover stormwater discharges from construction activities involving land disruption of less than five acres. See Id.

DISCUSSION

A. Defendant's Motion to Dismiss Plaintiff's Claim, and Motion for Summary Judgment.

In consideration of a Rule 12 (b)(6) motion, the Court, generally, may look only at the pleadings. See Fed. R. Civ. P. 12(b). However, when matters outside the pleadings have been presented to, and not excluded by the Court, the Court will treat Defendant's motion as one for summary judgment, and will consider the parties' evidence. Id. The motion is then disposed of as provided in Fed. R. Civ. P. 56. Id.

In accordance with Fed. R. Civ. P. 56, this Court will grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a mater of law." In cases such as this where the movant is the defendant, that party must demonstrate that the nonmoving party, the plaintiff, lacks evidence to support an essential element of her or his claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988).[3] The movant's burden is "discharged by showing -- that is,

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[3]In contrast, where the movant is the plaintiff, that party must demonstrate the absence of an issue of material fact with regard to every element essential to his or her claim. See Id.

pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. However, it is not enough in most situations for the movant merely to point out to the court this absence of evidence. Id. at 323; Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Rather, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

Only after the movant meets its initial burden does any obligation on the part of the nonmovant arise. Id.; Adickes v. S. H. Kress & Co., 398 U.S. 144, 160 (1970); Clark, 929 F.2d at 608. Nevertheless, once the movant has met this initial burden, the opposing party must present evidence establishing a material issue of fact. Celotex, 477 U.S. at 325. The nonmoving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324.

All evidence and factual inferences should be viewed in the light most favorable to the nonmoving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly

probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of every element essential to his or her case so as to create a genuine issue for trial. Celotex, 477 U.S. at 323; Rollins, 833 F.2d at 1528.

Defendant argues that the Court should dismiss Plaintiff's suit on the following grounds: (1) Plaintiff fails to state a claim upon which relief may be granted because he neglected to plead that Defendant's construction activities involves land disturbances of "greater than five acres." (2) Plaintiff lacks standing because "there exists no manageable or precise benchmarks to guide this court in granting the prospective relief demanded by plaintiff," (3) the EPD has primary jurisdiction, and (4) Plaintiff failed to join an indispensable party. Defendant's Motion to Dismiss, pp. 7-12.

In the instant case, matters outside the pleadings have been presented to, and have not been excluded by the Court. Additionally, Plaintiff was given notice of Defendant's Motion for Summary Judgment, and adequate time to respond, and did so respond. The Court, therefore, will treat Defendant's motion as one for summary judgment, and will consider the parties' evidence. See Fed. R. Civ. P. 12(b).

1. Failure to State a Claim.

Evidence presented at the October 16, 1992 hearing demonstrates that Defendant's construction activities involved land disruption of less than five acres. See Affidavit of J. Dennis Billew, 14. As of October 1, 1992, the CWA no longer provides an exception to land disturbances of five acres or less. 33 U.S.C. § 1342(p). Thus, evidence is before the Court that Defendant may be liable for discharges made subsequent to

October 1, 1992. The Court, therefore, denies Defendant's Motion for Summary Judgment on Defendant's first-stated ground.

2. Standing.

Defendant asserts that Plaintiff does not have standing under the CWA because the Act does not permit citizen suits where the relief sought would require the court to make complex findings of fact and engage in an independent process of standard-setting. Defendant's Motion to Dismiss, p. 8. The CWA provides that any citizen may commence a civil action against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . ." 33 U.S.C. § 1365(a). The term "effluent standard or limitation" is defined in such a way that citizens may bring suit against any person alleged to be discharging pollutants into waters of the United States without a valid NPDES permit. See 33 U.S.C. § 1311(a).

Defendant cites the Act's legislative history for the proposition that authorization of citizen suits is restricted to cases in which there exist "manageable and precise benchmarks for enforcement" by the courts. The legislative history actually states that the Act was drafted in such a way as to make "[e]nforcement of pollution regulations . . . . not a technical matter beyond the competence of the courts." S. Rep. No. 414, 92d Cong., 2d Sess. 80 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3747. Because the Act was so drafted, "citizen suits [will facilitate] the development of clear and identifiable requirements [that will in turn] provide manageable and precise benchmarks for enforcement." Id. Thus, the legislative history shows not that the citizen suit provision should be limited to suits where there are

"manageable and precise benchmarks for enforcement," but that the provision was drafted so as to include courts in the development of "manageable and precise benchmarks for enforcement." See also Id. at 3746 ("It is the [Senate Public Works] Committee's intent that enforcement of [a violation of an effluent standard or limitation established under the Act] be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."); Georgia Environ. Project v. Atlanta, No. 90-345, slip op. at 15-16 (N.D. Ga. June 27, 1991) (Moye, J.) ("GEP I") ("[c]itizens suits are proper where, as here, 'the Federal, State and Local agencies fail to exercise their enforcement responsibility.' . . . It is the EPD's failure or refusal to prohibit the continuing violations which necessitated this suit. The very purpose of the citizens' liberal right of action [under the FWPCA] is to stir slumbering agencies") (citations omitted).

Even if the courts were so constrained, however, Plaintiff's suit does not require any complex findings or applications. Plaintiff's claims are not, as Defendant charges, "an attempt to have this court draft and issue a permit which no environmental regulatory agency has heretofore required or been able to prepare." Defendant's Motion to Dismiss, p. 9. Rather, Plaintiff asks only that the Court determine from the evidence that Defendant has discharged stormwater without an NPDES permit. Such a finding would entitle Plaintiff to damages, sanctions, and an injunction, which appears to be all that Plaintiff seeks. Plaintiff does not ask the Court to issue an NPDES permit to Defendant, nor does Plaintiff's desired relief require such. Thus, the Court finds that Plaintiff has standing to bring its citizen suit against Defendant.

3. Primary Jurisdiction.

Defendant asserts that the EPD has primary jurisdiction over Plaintiff's claim, and, therefore, that the Court should refer Plaintiff's suit to the EPD. Defendant's Motion to Dismiss, p. 10. The primary jurisdiction doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956). The doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Id. at 64. Generally, a court should suspend the judicial process and refer certain issues to an administrative body where resolution of the issues would benefit from the agency's "expertise and specialized knowledge." Id.; Taffet v. Southern Co., 930 F.2d 847, 854 (11th Cir. 1991); Feldspar Trucking Co. v. Greater Atlanta Shippers Assoc., 683 F. Supp. 1375, 1377 (N.D. Ga. 1987) (Freeman, J.). A court should also invoke the primary jurisdiction doctrine when doing so "will promote doing so "will promote . . . . uniformity in a highly regulated area." Western Pac., 352 U.S. at 64; Taffet, 930 F.2d at 854; Feldspar, 683 F. Supp. at 1377.

Defendant claims that invocation of the primary jurisdiction doctrine is appropriate here because to properly resolve Plaintiff's claims, the Court will have to step into the EPD's shoes and fashion a permit for Defendant. See also Defendant's Motion to Dissolve, p. 15. This is not so. Plaintiff is not asking the Court to make any determinations that would benefit from the EPD's expert analysis, or that would be mooted by the EPD's eventual issuance of an NPDES stormwater permit. Plaintiff asks merely that the Court

determine from the evidence that the CWA permits no stormwater discharges without a permit, that Defendant has discharged stormwater, and that Defendant does not have a permit. The CWA already sets out all of the relevant standards for the Court to consider, and determination of the facts and their application to those standards require absolutely no administrative expertise. Therefore, the Court finds that Plaintiff's claim is not appropriate for referral to the EPD's primary jurisdiction. Compare Feldspar, 683 F. Supp. at 1377.

4. Indispensable Party.

Defendant contends that Plaintiff has failed to join, and is incapable of joining, an indispensable party, namely the State of Georgia. Therefore, Defendant asserts, Plaintiff's claim is unlikely to prevail on the merits. Defendant's Motion to Dismiss, pp. 11-12. Federal Rule of Civil Procedure 19(a) instructs that a person is an indispensable party, and, therefore, must be joined, if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Federal Rule of Civil Procedure 12(b)(7), in turn, permits courts to dismiss complaints for failure to join an indispensable party under Rule 19(a).

Defendant argues that Plaintiff is seeking to compel it to obtain an NPDES stormwater permit, and that such relief would adversely impact the EPD's ability to implement a uniform administration of water quality laws. Defendant cites Georgia Environ. Project v. Atlanta, No. 90-345 (N.D. Ga. March 22, 1991) (Moye, J.) ("GEP I") as support for its contention that Plaintiff is actually trying to force EPD to take action, thus making the EPD an indispensable party.

In GEP I, the plaintiff sued the defendant for discharging untreated sewage without an NPDES permit. Id. at 1-2. The CWA required an NPDES permit to discharge untreated sewage, but under the Georgia Water Quality Act, pursuant to which the CWA is implemented in Georgia, the defendant was not required to have a permit until March 31, 1991. Id. at 4. This GWQCA provision was approved by the EPA. Id. at 5. The court found that the plaintiff's suit was, by necessity, an attempt to render the GWQCA, and the EPA's approval of it ineffective. Id. Therefore, the court concluded, the EPD and the EPA had an interest in defending the GWQCA provision from Plaintiff's attack. Id. The court held that the EPD and the EPA were indispensable parties, because plaintiff was attempting "to enjoin further CSO discharges and impose penalties for past [] discharges, even though Georgia law does not require permits . . . until March 31, 1991. Id. (emphasis added).

In the instant suit, Georgia law does not claim to immunize Defendant from the need to obtain an NPDES permit before discharging stormwater. A finding by the Court that Defendant is in violation of the CWA and liable to injunction

and penalties would not have the incidental effect of rendering the GWQCA or any other Georgia law ineffective. Nor would it run counter to any past EPA decision. In addition, the relief sought by Plaintiff would not require Defendant to obtain from the EPD an NPDES permit that does not yet exist. It will require only that Defendant obtain an NPDES permit if it intends to continue discharging stormwater. Therefore, neither the EPD nor the EPA is an indispensable party to Plaintiff's suit. In light of the above discussion, the Court denies Defendant's Motion for Summary Judgment.

B. Plaintiff's Motion for a Preliminary Injunction, and Defendant's Motion to Dissolve the TRO.

It is within this Court's sound discretion to grant or deny a preliminary injunction. United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983). The Court must consider the following four prerequisites for a preliminary injunction in exercising its discretion:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not serve the public interest.

Id. (citing Canal Authority v. Callaway, 489 F.2d 5671 572 (5th Cir. 1974)).

1. Likelihood of Plaintiff Prevailing on the Merits.

Defendant contends that Plaintiff would be unlikely to prevail on the merits, should this case go to trial, because the

Court would likely find that: (1) the EPD has primary jurisdiction, (2) Plaintiff lacks standing, (3) Plaintiff failed to join an indispensable party, (4) Plaintiff's claim is moot, or (5) the Court should invoke the abstention doctrine. Defendant's Motion to Dissolve, pp. 14-17. The Court has already addressed Defendant's first three assertions. In light of that discussion, the Court finds that, with regard to those three issues, there is a substantial likelihood Plaintiff would prevail on the merits at trial.

a. Mootness.

Defendant asserts that Plaintiff's claim is moot because (1) Plaintiff does not own the "point sources" from which the stormwater is discharged, (2) Plaintiff has obtained and complied with all available permits, and (3) the EPD will soon begin issuing NPDES permits that will cover Defendant's discharges. Defendant's Motion to Dissolve, pp. 10, 14, 16.

Defendant contends that because Gwinnett County accepted Defendant's dedication of the subdivision's roads and stormwater delivery systems prior to any alleged violation, it was the County, and not Defendant, who actually "discharged" the stormwater. Federal regulations governing Georgia's NPDES program provide that "[when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." 40 CFR § 122.21 (b). At the October 16, 1992 hearing, Mr. Douglas C. Ballard, President of Defendant JMS Development Corporation, testified that a condition of Defendant's conveyance of the stormwater delivery systems to Gwinnett County was that Defendant maintain them for one year. That one year obligation presumably began on August 6, 1992 -the dedication date- and continues to be in effect today. Thus, although Gwinnett County may own the discharge points, Defendant's

continuing obligation to maintain them places upon it the responsibility of obtaining an NPDES permit. Evidence was also presented that stormwater was discharged from a sediment basin owned and operated by Defendant. This sediment basin would likely be deemed a "point source," and, therefore, Defendant, as its owner and operator, would be liable for any discharges made without a permit. See Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45 (5th Cir. 1980) (defining "point source"); 40 CFR § 122.2 (same). Georgia law similarly places on the operator of a point source the responsibility for obtaining a permit. O.C.G.A. § 12-530(a). Thus, under both federal and state law, Defendant is liable for any violative stormwater discharges from these sources.

Defendant is mistaken when it states that it has obtained and complied with all necessary permits. Under federal law, Defendant may not discharge stormwater without an applicable NPDES permit. Defendant does not have such a permit. The acknowledged unavailability of an NPDES stormwater permit in the state of Georgia does not alter this equation. The Clean Water Act establishes an absolute ban absent a permit, and does not make accommodations for a state's refusal to make a permit available. Defendant's possession of a Gwinnett permit pursuant to O.C.G.A. § 127-8 does not absolve it of the obligation to obtain an NPDES permit before discharging stormwater.

Finally, Defendant's assertion that the EPD will soon issue NPDES permits that will cover its discharges is incorrect. As discussed above, neither of the EPD's two proposed NPDES stormwater permits will cover stormwater discharges from construction activities involving land disruption of less than five acres. The testimony before this Court is that Defendant's construction activities involve land disruption of only 4.64

acres. Affidavit of J. Dennis Billew, 14. Thus, even when the EPD issues its NPDES stormwater permits, if they mirror the proposed permits, and if Defendant's activities continue to disrupt only 4.64 acres of land, Defendant will still be unable to acquire a permit to discharge stormwater.[4]

b. Abstention Doctrine.

The EPD, in its Amicus brief, moves the Court to apply the federal abstention doctrine and refuse to grant an injunction. EPD's Amicus Curiae Brief, p. 9. In Burford v. Sun Oil Co., 319 U.S. 315 (1943), the Supreme Court

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[4]It is regrettable that the EPD has decided to compound the damage its slothfulness has already wrought by neglecting to propose an NPDES permit that will cover stormwater discharges from construction activities involving less than five acres of land disturbance.

The EPD has never been required to wait for the EPA to issue NPDES permits for certain types of discharges before it could develop and issue permits in Georgia for the same types of discharges. Georgia's decision to "largely follow[] the lead of the U.S. EPA in regulating storm water discharges" was made of its own volition. See EPD's Amicus Curiae Brief, p. 6. See also Id. at 4 ("[i]t would be fair to say that, during the 1970's and 80's, the focus of water pollution control efforts both by EPA and by the delegated states was the control through permitting of industrial wastewater discharges and municipal wastewater treatment plant discharges. EPA's intent [and supposedly that of the EPD] was that storm water discharges would eventually be regulated by means of general permits . . . ") (emphasis added); Affidavit of David M. Word, Chief of the Water Protection Branch for the EPD, 17 ("Because [Georgia has regulated stormwater discharges under state law since 1975], it has not been a priority of EPD to create [an NPDES stormwater permitting] program"). Although the argument can be made that limited resources required the EPD to prioritize its tasks, the Department's callous decision to delay issuing NPDES stormwater permits until after the date sanctions became available under the CWA for stormwater discharges without a permit, has stranded Defendant in this essentially no-win position. Unfortunately, because EPD's authority to develop permits is discretionary, even the route of Mandamus is denied to parties in the Defendant's position.

counseled against federal courts exercising their discretionary power where doing so "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 814 (1976). In 1989, the Supreme Court described in more succinct form the reach of Burford abstention:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (citation omitted).

Plaintiff asserted at the November 4, 1992 hearing that the Burford doctrine's concern that federal courts not interfere unduly in states' interpretation and application of state laws and regulations is not implicated when the claim involves federal regulatory authority that has been delegated to the states, because the resulting state permit requirements become federal law. This conclusion is not as obvious as Plaintiff contends. See Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd., 453 F. Supp 122, 125-26 (E.D. Va. 1978) (finding

that "the state issuance of NPDES permits does not . . . constitute an act which is federal in nature.").

However, even if the EPD's NPDES permitting scheme is sufficiently non-federal to raise a Burford doctrine question, the determination Plaintiff asks the Court to make here does not warrant exercise of the doctrine. In New Orleans, the Supreme Court found that even if the regulations at issue were non-federal, application of the doctrine was inappropriate because Plaintiff's requested relief required "no inquiry beyond the four corners" of the allegedly state-regulatory decision. 491 U.S. at 350. Such a limited inquiry, the Court found, "would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." Id. Similarly, Plaintiff's request that the Court determine (1) whether the CWA prohibits stormwater discharge without an NPDES permit, (2) whether Defendant is discharging stormwater, and (3) whether Defendant has an NPDES stormwater permit, do not require interference with, or undue inquiry into, any state law or regulatory scheme. Therefore, the Court finds application of the federal abstention doctrine inappropriate in this case.

2. Threat that Plaintiff Will Suffer Irreparable Injury if the Injunction is Not Granted.

Defendant asserts that Plaintiff's alleged injury is not irreparable because the Court can order Defendant to restore any harm to the Yellow River, and pay damages to Plaintiff. Defendant's Motion to Dissolve, p. 17. Environmental injury is generally considered to be irreparable. See, e.g., Amoco Prod. Co. v. Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.");

Logan v. Gilmer County, No. 91-147, slip op. at 11 (N.D. Ga. Nov. 13, 1991) ("Monetary damages are not adequate relief for continued discharge of pollutants into United States waters in disregard of federal law and the health and safety of others."); Sierra Club v. Cargill, 732 F. Supp. 1095, 1101 (D. Colo. 1990) (same); United States v. Malibu Beach, Inc., 711 F. Supp. 1301, 1312-13 (D.N.J. 1989) ("Equitable relief is appropriate here because there is no adequate remedy at law to compensate the public for the harm caused by the disposal of fill material into waters of the United States.").

Dr. Wade Nutter, a Professor of Hydrology at the University of Georgia, testified that he inspected the stream bed near the discharge point and found "about six inches" of sediment had been deposited there. Testimony of Wade Nutter, October 16, 1992, p. 10. Dr. Nutter also testified that whereas the original stream bottom contained organic matter, the deposited sediment did not. Id. In addition, Plaintiff testified at the November 4, 1992 hearing that the sedimentation of the Yellow River due to the stormwater discharge interferes with his ability to use and enjoy the river. The Court concludes that Plaintiff will likely suffer an irreparable injury if an injunction is not issued.

3. Balancing Plaintiff's Alleged Harm Against Defendant's Probable Harm.

Mr. Ballard testified at the October 16, 1992 hearing that if Defendant is enjoined from discharging any stormwater without an NPDES stormwater permit, it will be unable to sell lots on the subdivision or secure any future loans. As a result, Mr. Ballard testified, Defendant may have to file for bankruptcy.

Balanced against this probable harm is the presumption that if environmental harm is sufficiently likely, "the balance

of harms will usually favor the issuance of an injunction to protect the environment." Gambell, 480 U.S. at 545. In addition, compliance with an injunction against discharging stormwater without an NPDES stormwater permit will prevent Defendant's continuing exposure to civil penalties under the CWA of up to $25,000 per day, per violation. See 33 U.S.C. § 1319(d); Logan v. Gilmer County, slip op. at 11. Weighing the parties' potential harms against one another, the Court concludes that the threatened injury to Plaintiff outweighs the threatened harm of an injunction to Defendant.

4. The Public's Interest.

The Court concludes that granting Plaintiff's Motion for a Preliminary Injunction serves the public interest. Congress enacted the CWA's zero-discharge standard and NPDES permit program pursuant to the public's interest in restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. See 33 U.S.C. § 1251(a). This interest is furthered by enforcing the CWA, and alerting tardy agencies of their need to make permits available. See 1972 U.S. Code Cong. & Admin. News 3747 (citizens perform a public service by bringing citizen suits under the CWA). Compare Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d. Cir. 1976) ("the very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.").

Based on the foregone analysis, the Court finds that it is appropriate to issue a preliminary injunction to Defendant. Accordingly, in light of the above discussion, the Court denies Defendant's Motion to Dissolve the TRO.

C. Plaintiff's Motion to Hold Defendant in Contempt of Court.

Plaintiff moves the Court to hold Defendant in Contempt for breaching the Court's August 31, 1992 60-day TRO, and September 11, 1992 60-day extension. Plaintiff's Contempt Motion, p. 1. [13-1]. Parties moving for contempt sanctions bear the initial burden of proof, by Trading Comm'n v. Wellington Precious Metals, Inc., 950 F. 2d 1525, 1529 (11th Cir. 1992). If such a showing is made, the alleged contemnor may defend its failure on the grounds that it was unable to comply, despite making, in good faith, all reasonable efforts to do so. United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988).

The Court's TRO restrained Defendant from discharging stormwater from the subdivision without a permit. [5-1]. At the October 16, 1992 hearing, Plaintiff presented clear and convincing evidence that Defendant violated the TRO on September 4, 5, 27, 28, and October 4 and 8, 1992. Plaintiff requests the Court to fine Defendant $25,000 per day of violation, or $150, 000 total. Plaintiff 's Contempt Motion, p. 3.

Despite finding that Defendant violated the TRO, the Court declines to hold it in contempt because, in the Court's opinion, Defendant made, in good faith, all reasonable effort to comply. At the October 16, 1992 hearing, Mr. Douglas C. Ballard testified that Defendant has taken numerous steps to prevent stormwater discharges from the subdivision. See also Affidavit of Douglas C. Ballard, pp. 3-4. According to Mr. Ballard, Defendant has not engaged in any land disturbing activities in the subdivision subsequent to the August 31, 1992

TRO.[5] Mr. Ballard testified also that Defendant had expended more than $30,000 on erosion control, including siltation fences, rock dams, a sediment basin, and sodding. Defendant demonstrated the extent of these efforts at the November 4, 1992 hearing, by entering into evidence a series of photographs displaying the labyrinthical layering of siltation fences it has installed. Defendant's Exhibits, 24, 26, 27, 28, 29 and 30.

Plaintiff counters that the TRO restrained Defendant from discharging any stormwater without a permit, and that Defendant even admits that its prevention efforts were not designed to eliminate all discharges. However, although Defendant was not able to enter into the record any direct evidence that complete elimination of stormwater discharge is impossible, the clear inference from all evidence presented is that full compliance is impossible as a practicable matter.[6] Therefore, the Court denies Plaintiff Is Motion to Hold Defendant in Contempt of Court.

CONCLUSION

The Court DENIES Defendant's Motion to Dissolve the TRO as moot. [14]. The Court DENIES Defendant's Motion to Dismiss, and Defendant's Motion for summary Judgment. [16].

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[5]Mr. Ballard did testify that land was disturbed after the TRO was issued in order to install various utility components. That work, however, was conducted by government employees, not under Defendant's control, though at Defendant's request in March, 1992, on land to which Gwinnett County had a right of way.

[6]Defendant's counsel asserted at the November 4, 1992, hearing that the only way Defendant could fully comply the TRO would be to construct a moat around its subdivision. The Court is not convinced that even by going to this absurd length Defendant could eliminate all discharges. This Court, therefore, declines to find Defendant in Contempt for failing to prevail over what is, in fact, a Hobson's choice.

The Court GRANTS Plaintiff's Motion for a Preliminary Injunction [18], but DENIES Plaintiff Is Motion to Hold Defendant in Contempt of Court. [13]. Remaining before the Court is Plaintiff's Complaint. [l].

So ORDERED this 9th day of November, 1992.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	1:92-cv-2051-RHH
vs.	)	
	)	
JMS DEVELOPMENT	)	
CORPORATION,	)	
Defendant.	)	

ORDER

Based upon the Order filed contemporaneously herewith respecting Plaintiff's Motion for a Preliminary Injunction; IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That Defendant, JMS Development Corporation, shall not discharge stormwater into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place, without a National Pollutant Discharge Elimination System permit permitting such discharge.

So ORDERED this 9th day of November, 1992.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT	)	
CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on the Home Builders Association of Georgia's Motion for Leave to File a Brief as Amicus Curiae [15], and to File a Supplemental Brief as Amicus Curiae [25]. This case is also before the Court on the Georgia Department of Natural Resources, Environmental Protection Division's Motion to File a Brief as Amicus Curiae [19], Defendant's Motion to Amend this Court's November 9, 1992 Order, or, in the alternative, for Relief from the Order [28], and Plaintiff's Motion for Permanent Injunction and for Summary Judgment [30]. The Court GRANTS both of the Home Builders' motions, GRANTS the Georgia Department of Natural Resources' motion, DENIES Defendant's motion, and DENIES Plaintiff's motion.

BACKGROUND

I. Procedural History.

Defendant, JMS Development Corporation, is a Georgia corporation engaged in the development of a 19.2 acre subdivision known as Rivercliff Place ("the subdivision"), in Gwinnett County Georgia. Plaintiff, Terence Hughey, is a resident of Gwinnett County, and owns property in the county, adjacent to the Yellow River, and topographically downhill from the subdivision.

On August 28, 1992, Plaintiff filed suit against Defendant claiming that Defendant was violating the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("the CWA"), by discharging from the subdivision, without a permit, sedimentation collected in rain-water runoff, that travels off of the property, into a stream, and into the Yellow River [1]. Plaintiff requested that the Court enjoin Defendant, and award damages. The Court issued a Temporary Restraining Order on August 31, 1992, restraining Defendant from "discharging sand, silt, asphalt runoff and other pollutants into any waters of the United States without a permit." [5].

On October 13, 1992, Plaintiff filed a Motion to Hold Defendant in Contempt of Court for having discharged storm water, in violation of the TRO, on September 4, 5, 27, 28, and October 4, and 8, 1992. Plaintiff's Contempt Motion, pp. 1-2. (13]. On October 15, 1992, Defendant filed a Motion to Dissolve the TRO. (14]. The Court held hearings on October 16 and November 4, 1992, and issued an Order on November 9, 1992 denying Defendant's motion to dissolve the TRO, denying Defendant's motion to dismiss Plaintiff's complaint, granting Plaintiff's motion for a preliminary injunction, and denying Plaintiff's contempt motion. Hughey v. JMS Dev.

Corp., No. 92-2051 (N.D. Ga. Nov. 9, 1992) (hereinafter Hughey).

Defendant filed its Motion to Amend on November 19, 1992, on the basis of recent developments in both the law and the facts of the case. On November 24, 1992, the Court stayed its November 9, 1992 Order [29], but did not rule on Defendant's motion. Since that time, Plaintiff has moved for summary judgment and for issuance of a permanent injunction.

II. Facts.

Defendant's subdivision contains 50 lots for the construction of residential homes. Forty of these lots are currently owned by Defendant. Defendant has sold the remaining ten lots to individuals or builders, some of whom have begun constructing homes thereon. No construction has begun on Defendant's forty lots. In the Spring of 1992, Defendant began its development of the subdivision by clearing, grubbing and grading an area of the property for the construction of three streets, with related curbing, gutters and storm sewers. Defendant alleged that its street construction involved the disturbance of approximately 4.64 acres of land. Defendant's Motion to Dissolve, p. 2 [14]. Plaintiff concedes this fact, but argues that Defendant' s total land disruption involved more than five acres. On August 6, 1992, Defendant dedicated the streets, curbing, gutters and storm sewers to Gwinnett County, and the county accepted same.

On March 31, 1992, prior to commencing its clearing, grubbing and grading activities, Defendant obtained a Gwinnett County development permit ("Gwinnett permit"), authorizing it to engage in land-disturbing activity in the subdivision, and permitting it, under state law, to discharge certain amounts of

storm water[1]. Gwinnett County issued the Gwinnett permit pursuant to its authority to administer Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("the SESCA") within the physical confines of Gwinnett County. See O.C.G.A. § 12-7-8.

The SESCA restricts the concentration of silt that can be discharged in storm water in Georgia. The Act prohibits storm-water discharges that are more than "50 nephelometric turbidity units "NTUs") higher than the turbidity level of the receiving stream immediately upstream from the storm water runoff discharge at the time of such discharge . . .." O.C.G.A. § 12-7-6(18). Plaintiff presented evidence at an October 16, 1992 hearing that Defendant had discharged storm water that was more than fifty-NTUs higher than any background turbidity. See Testimony of Dr. Wade Nutter, pp. 6, 8-32, 35-39; Testimony of Terence Hughey, pp. 8-17, 24, 38-43, 59-61, 83-85, 103.

On November 19, 1992, Defendant first acquired a National Pollutant Discharge Elimination System ("NPDES") storm-water permit, which generally is required in order to exempt oneself from the CWA's federal prohibition on discharging storm water. Defendant's failure to obtain an NPDES permit prior to this date is due, at least in part, to the State of Georgia's failure to make NPDES storm-water permits available to potential applicants (see infra).

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[1]Under both federal and state law, the term "storm water" is used for water that contains sedimentation from land-disturbing activities.

III. The Clean Water Act, and the NPDES Permitting Program.

In 1972, Congress amended the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." Pub. L. No. 92-500, § 2, 86 Stat. 816 (codified at 33 U.S.C. § 1251(a)). Pursuant to this objective, the Act prohibits the discharge of any pollutants from a "point source,"[2] except in accordance with standards promulgated in permits issued under other sections of the Clean Water Act. § 301(a) (codified at 33 U.S.C. § 1311(a)). The permitting scheme requires that persons seeking to so discharge pollutants must obtain an NPDES permit, either from the Environmental Protection Agency ("the EPA"), or from their state environmental agency if the EPA has delegated authority to the state to issue the permits. § 402 (codified at 33 U.S.C. § 1342).

The Act also authorizes individuals to commence suits on their own behalf ("citizen suits"). § 505(a) (codified at 33 U.S.C. § 1365 (a)). A person may bring a citizen suit against "any person who is alleged to be in violation of an effluent standard or limitation under this chapter . . . ." Id.

On June 28, 1974, the State of Georgia received authority to administer the NPDES program within its borders. Pursuant to this grant of authority, the CWA is now implemented in Georgia by the Georgia Water Quality Control Act ("the GWQCA"), O.C.G.A. § 12-5-20 et seq. Georgia, in turn, has delegated the authority to issue NPDES permits to the

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[2]The CWA defines "point source" as "any discernible, confined and discreet conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged." § 502(14) (codified at 33 U.S.C. § 1362 (14)).

Environmental Protection Division of the Georgia Department of Natural Resources ("the EPD"). O.C.G.A. § 12-5-20.

The CWA did not explicitly address storm-water discharges, however, until it was amended in 1987. In that year, Congress enacted the Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 3 3 U.S.C.), and created a new regulatory scheme for storm-water discharges. § 402(p) (codified at 33 U.S.C. § 1342(p)). Congress subsequently amended the regulatory scheme in 1991, and again in 1992. Pub. L. No. 102-240, § 1068, 105 Stat. 2007; Pub. L. No. 102-580, § 364, 106 Stat. 4797.

Until October 31, 1992, § 402(p) prohibited the EPA, or states to which NPDES permitting authority had been delegated, from requiring NPDES permits prior to October 1, 1992 for storm-water discharges. § 402(p)(l). The section, however, excepted from this moratorium discharges "associated with industrial activity." § 402 (p)(2)(B). Federal regulations define "storm water discharge associated with industrial activity" as "construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." 40 C.F.R. § 122.26(b)(14)(x).

On October 31, 1992, Congress amended section 402(p) to extend, from October 1, 1992 to October 1, 1994, the date upon which dischargers of storm water would be required to obtain NPDES permits. The Water Resources Development Act of 1992, Pub. L. No. 102-580 § 364, 106 Stat. 4797. Congress continued, however, to exempt discharges "associated with industrial activity" from the moratorium. Thus, prior to October 1, 1994, one does not violate the CWA

by discharging storm water without an NPDES permit, so long as the discharge is not associated with industrial activity. However, it has been and continues to be a violation of the CWA to discharge storm water without an NPDES permit if the discharge is associated with construction activity resulting in the disturbance of more than five acres, or the disturbance of less than five acres if those less-than-five-acres are part of a larger common plan of development or sale.

The Water Quality Act also imposed deadlines prior to October 1, 1992 for the EPA, or states with delegated authority, to establish NPDES permit application requirements, and to accept and respond to applications. § 402(p)(4). The EPA failed to comply with these deadlines. Not until September 9, 1992 did the EPA make available a "general NPDES permit" to cover storm-water discharges falling under § 402(p)(2)(B). 57 Fed. Reg. 41,176 - 41,233 (September 9, 1992). The EPD, apparently in an effort "to be consistent with the federal program," has consistently waited until after the EPA has acted before implementing each step of its permit authorization process. See EPD's Amicus Curiae Brief, p. 8.

On November 19, 1992, Defendant obtained an NPDES general permit authorizing Defendant, upon submittal of a Notice of Intent ("NOI"), "to discharge storm water associated with construction activity to the waters of the State of Georgia in accordance with [limitations and conditions set forth in the permit]." Permit, cover page (appended to Defendant's Motion to Amend at Exhibit A-1). That same day, Defendant submitted an NOI to the EPD. Defendant's Motion to Amend, Exhibit B-1.

DISCUSSION

I. Amicus Briefs.

The Court referred to the Home Builders and the Georgia Department of Natural Resources' Amicus briefs in reaching its November 9, 1992 ruling, but neglected to grant the organizations' motions explicitly. The Court grants both organizations, motions for leave to file briefs as Amicus Curiae, and grants the Home Builders' motion to file a supplemental brief.

II. Defendant's Motion to Amend and for Relief.

Defendant moves the Court to amend its November 9, 1992 Order to deny Plaintiff's motion for a preliminary injunction, permanent injunction, and civil penalties, and to grant Defendant's motion for summary judgment. Defendant bases its motion on the following grounds.

A. The Association of Defendant's Discharges with Industrial Activity.

Defendant contends that as a result of the 1992 Act, neither the EPA nor the EPD require NPDES permits for storm-water discharges associated with land disturbance involving less than five acres of land until October 1, 1994. In light of the Court's finding in its November 9, 1992 Order that Defendant's construction activities involved land disruption of less than five acres (i.e., 4.64 acres), Defendant asserts that it is not required to obtain an NPDES permit until October 1, 1994.

As stated above, a storm-water discharger generally need not secure an NPDES permit prior to October 1, 1994 order to discharge storm water and remain in compliance with the CWA. § 402(p)(1). However, if the discharge is

"associated with industrial activity," then it is not covered by the October 1, 1994 moratorium (nor the October 1, 1992 moratorium), and the discharger is in violation of the CWA unless it has an NPDES permit. § 402 (p)(2)(B). Federal regulations define "[s]torm water discharge associated with industrial activity" as: "Construction activity including clearing, grading and excavation activities except; operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." 40 C.F.R. § 122.26(b)(14)(x) (emphasis added).

In the November 9, 1992 order, this Court stated that the "[e]vidence presented at the October 16, 1992 hearing demonstrates that Defendant's construction activities involved land disruption of less than five acres." Hughey, slip op. at 13. See also Id. at 23 ("The testimony before the Court is that Defendant's construction activities involve land disruption of only 4.64 acres.")

Plaintiff now contends that defendant was in violation of the CWA notwithstanding the 1992 Act's extension of the date by which NPDES permits must be secured. Plaintiffs argue that this is so even if Defendant's construction activities involved land disruption of less than five acres. Because those five acres are "part of a larger common plan of development or sale," Plaintiff argues, Defendant's discharges are "associated with industrial activities," and, thus, not covered by the October 1, 1994, or the previous October 1, 1992 moratoriums. See 40 C.F.R. § 122.26(b)(14)(x). See also Defendant's Statement of Material Facts as to Which There is no Genuine Issue to be Tried, ¶ 1 ("Defendant is a Georgia corporation engaged in the development of a 19.2 acre subdivision known as Rivercliff Place in Gwinnett County, Georgia (Ballard

affidavit, paragraph 2).") (appended to Defendant's Motion to Dismiss [16]); Testimony of Douglas C. Ballard on October 16, 1992, pp. 23-24 (answering "yes" when asked if his land-disturbing activities were "*conducted by and for JMS* Development Corporation as part of a common plan to develop the entire neighborhood" and whether "that entire neighborhood is in fact approximately 20 acres").

Defendant responds to Plaintiff,' s argument by entering into the record an affidavit of Loomis E. Deavours, Secretary of JMS Development Corporation, in which Deavours states that as of December 31, 1992, Defendant had sold ten lots in the subdivision to various individuals and builders, and that Defendant had "no intention to further develop or engage in land disturbing activities on property [it] owned." Deavours Affidavit, p. 1 (appended to Defendant's Response to Plaintiff's Motion for Summary Judgment at Exhibit D [33]). Deavours also testified that "all future land-disturbing activities will be performed by others on property not under the control of the JMS Development Corporation[, and that e]xcept for minor utility work performed by others, all construction activities by [Defendant] ceased prior to plaintiff filing his complaint." Id. at 1-2. Finally, Deavours testified that although Defendant is the developer of the 19.2 acre subdivision, it "has no 'common' ownership or control over the remaining construction activities occurring at [the] subdivision." Id. at 2.

Defendant also directs the Court's attention to a recent case in which the Ninth Circuit held that the CWA's exemption of construction sites smaller than five acres from the definition of storm-water discharges "associated with industrial activity" is arbitrary and capricious. Natural Resources Defense Council, Inc. v. United States E.P.A., 966 F.2d 1292, 1305-06 (9th Cir. 1992) (hereinafter "N.R.D.C."). The Ninth Circuit did not find

that the EPA' s inclusion of some construction activities within the definition of "industrial activity" was arbitrary and capricious. Rather, the Circuit found that the EPA's establishment of five acres of construction activity as the threshold for industrial activity was arbitrary and capricious. Id. at 1306, 1310. In fact, what the Circuit found to be arbitrary and capricious primarily was the EPA's rationale for increasing the threshold from its proposed level of one acre of land-disturbing construction activity to the eventually-adopted five-acre level. Id. at 1305-06 ("We find the EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious."). Furthermore, the Circuit explicitly limited its ruling to striking the inclusion of sites five acres or smaller within the moratorium, the Circuit did not strike the exclusion of sites over five acres, or sites part of a larger plan of development or sale from the moratorium. Id. at 1306 ("We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, [and] invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements . . . .").

The Court finds that Defendant's discharges were "associated with industrial activity", and, thus, were not covered by the CWA's October 1, 1992 and October 1, 1994 moratoriums. Although Defendant's construction activities involved land disruption of less than five acres (i.e., 4.64 acres), those 4.64 acres are "part of a larger common plan of development or sale." Therefore, the CWA has required, and continues to require Defendant to have an NPDES permit before discharging any storm water.

B. Plaintiff's Compliance With the Sixty-Day Notice Requirement.

Defendant contends that Plaintiff's claim against it was invalid as premature because the CWA does not give courts jurisdiction over a plaintiff's claim unless the plaintiff gave the potential defendant sixty-days notice, following defendant's alleged violation of the CWA, of his intention to file suit. § 505(b). Defendant's argument requires a presumption that Defendant was and is covered by section 402(p)'s moratorium. Because the Court has found that this is not the case, the Court denies Defendant's motion to amend on this ground.

C. Defendant's Acquisition of an NPDES Permit.

Defendant also contends that even if the Court finds that Defendant's storm-water discharges from construction activities involves five or more acres, the November 9, 1992 Order should be amended because on November 19, 1992, Defendant filed a Notice of Intent to obtain, and in fact obtained, an NPDES general permit authorizing such discharges.

Defendant has indeed acquired an NPDES permit for its storm-water discharges. Plaintiff contends, however, that Defendant's NPDES Permit is invalid or inoperable for a variety or reasons. See Plaintiff's Response to Defendant's Motion, pp. 14-18 [31]. At this time, the Court need only focus on one of Plaintiff's proffered reasons: Plaintiff has appealed Defendant's NPDES permit, and by virtue of Georgia Rule and Regulation 391-1-2-.10, the issuance of the permit has been automatically stayed. See Ga. R. & Reg. 391-1-2-.10. See also Plaintiff's Supplemental Filing, and documents included therein [37, 38]; Defendant's Response to Plaintiff's Motion, Exhibit A.

In light of the ambiguous status of Defendant's NPDES permit, the Court finds that Defendant's prior acquisition of the permit is not grounds enough to amend the Court's Order. Furthermore, because the Court has found that Defendant was and is not covered by section 1342(p)'s moratorium, the acquisition of an otherwise valid permit does not fully resolve the issues before this Court.

Based on the above reasoning, the Court denies Defendant's motion to amend its November 9, 1992 Order, and denies Defendant's motion for relief from the Order.

III. Plaintiff's Motion for Summary Judgment and for a Permanent Injunction.

A. Standard of Review for Summary Judgment Motions.

This Court will grant summary judgment when "there is no genuine issue as to any material fact... and the moving party is entitled to judgment as a mater of law." Fed. R. Civ. P. 56(c). In cases such as this where the movant is the plaintiff, that party must demonstrate the absence of an issue of material fact with regard to every element essential to his or her claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988).[3] The movant's burden is "discharged by showing that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. However, it is not enough in most situations for the movant merely to point out to the court this absence of evidence. Id. at 323; Clark v. Coats & Clark,

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[3]In contrast, where the movant is the defendant, that party must demonstrate that the nonmoving party, the plaintiff, lacks evidence to support an essential element of her or his claim. Id.

Inc., 929 F.2d 604, 608 (11th Cir. 1991). Rather, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

Only after the movant meets its initial burden does any obligation on the part of the nonmovant arise. Id.; 398 U.S. 144, 160 (1970); Clark, 929 F.2d at 608. Nevertheless, once the movant has met this initial burden, the opposing party must present evidence establishing a material issue of fact. Celotex, 477 U.S. at 325. The nonmoving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324.

All evidence and factual inferences should be viewed in the light most favorable to the nonmoving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987); Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248.

B. Application.

Plaintiff contends that he is entitled to summary judgment because there is no genuine issue as to whether Defendant violated the CWA.

In a citizen suit brought pursuant to § 505 of the CWA, a plaintiff must prove that the defendant has discharged pollutants from a point source into waters of the United States, and that the defendant's discharges violated an applicable effluent standard or limitation under the CWA. § 505(a)(1). The term "effluent standard or limitation" includes (at least) section 301's prohibition against any discharges of pollutants without a valid NPDES permit.

This Court has already found that Defendant has discharged pollutants from the subdivision without a permit, and that section 402(p) did not exempt Defendant's discharges from the permitting requirement.

Defendant contends, however, that a genuine issue exists as to whether Plaintiff has suffered any injury in fact, and, therefore, as to whether Plaintiff has standing to assert his claims.[4] In support of its contention, Defendant has entered into the record affidavits of Dirk Van Reenen and Greg Wombough, a principle and employee, respectively, in the engineering firm of Atlanta Testing & Engineering. Wombough states in his affidavit that on November 2, 1992 he obtained three water samples from the Yellow River: One 100 feet upstream of the point at which the tributary stream, which originates near the subdivision, discharges into the Yellow River; one 100 feet downstream of that point; and one farther

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[4]Defendant challenged Plaintiff's standing previously, but on separate grounds. The Court found that Plaintiff did not lack standing on those grounds. Hughey, slip op. at 13-16.

downstream in front of Plaintiff's property. Wombough Affidavit, pp. 1-2 (appended to Defendant's Response to Plaintiff's Motion for Summary Judgment at Exhibit C [33]). Wombough also states that he collected the samples in sterile plastic bottles, and that it was raining at the time, and had been raining since the day before. Id. at 2.

Van Reenen states that he tested the water samples that Wombough collected for turbidity (i.e., clarity), and that the turbidity upstream of the stream's discharge point was higher than it was at both collection points downstream of the stream's discharge point. Van Reenen Affidavit, pp. 1-2 (appended to Defendant's Response to Plaintiff's Motion at Exhibit B). Van Reenen states further that based on his testing, it is his opinion that the discharges from the tributary creek into the Yellow River "had no adverse effect on the turbidity of the Yellow River." Id. at 2-3. See also Testimony of Van Reenen, pp. 115-125).

The Court finds that there is indeed a genuine issue as to whether Plaintiff has suffered an injury in fact, entitling him to standing before this Court. Although Plaintiff has entered into the record substantial evidence to support his claim, the Court finds that he has not established the absence of any genuine issue of material fact as to his standing. At the two previous hearings, Defendant was unable to present any evidence that during periods of rain, turbidity levels in the Yellow River downstream from where the discharges entered were not increased.[5] As a result, the only evidence before the

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[5]Defendant attempted to proffer such evidence through Van Reenen's testimony on November 4, 1992, but Van Reenen's testimony on this point was not admitted due to hearsay objections. Testimony of Van Reenen, pp. 122-125.

Court prior to its November 9, 1992 ruling was Plaintiff's photographic and video evidence of the discharges from the subdivision into the stream that travels some 750 to 1000 feet before merging into the Yellow River, and Plaintiff's testimony as to his visual impressions of the stream and the Yellow River's condition during rainfall. See, e.g., Hughey Testimony, pp. 34 (stating that he videotaped the Yellow River at "storm event time[s]"); 78-80 (recounting his visual impressions of the stream and the Yellow River both before and after Defendant began its land-disturbing activities); 90-91 (referring to video tape of the stream as it enters the Yellow River); 112-114 (recounting his visual impressions of the stream and the Yellow River, both during rain and in the absence of rain). See also id. at 35-36 (stating that there are other, unrelated creeks that feed into the Yellow River, and that although he had "checked on those streams," he had not checked "precisely how they would relate and contribute to this problem").

Plaintiff never had water from the Yellow River tested for turbidity. See Hughey Testimony, pp. 103 (answering "no" when asked if he has any scientific measurements taken of the damage to the Yellow River or to the "stream" below a point "just below [where the subdivision's discharge enters the stream]").

Although Defendant entered evidence of measurements only from November 2, 1992, and thus can only suggest conditions on the specific days upon which Plaintiff alleges violations occurred, the Court finds that it is enough to create a genuine issue because Plaintiff's evidence of the condition of the Yellow River (as opposed to the condition of the stream and drainage pipes just below the subdivision) is strictly anecdotal, and much of it is not date specific. The Court, therefore, denies Plaintiff's motion for summary judgment.

For the same reasons as discussed above, the Court denies Plaintiff's motion for issuance of a permanent injunction. In light of the current status of the evidence in this case, the Court will continue to Stay its November 9, 1992 Order.

IV. Relation Between the CWA and the SESCA's Fifty-NTU Limitation.

Defendant has also requested the Court to clarify dicta found in its November 9, 1992 Order concerning whether the term "effluent standard or limitation" found in section 505 of the CWA includes the SESCA's fifty-NTU limitation. See Hughey, slip op. at 7. The Court finds that resolution of this issue is unnecessary to rule upon the parties' pending motions.[6]

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[6]The Court notes that existing authority from other circuits on this issue is unclear and possibly contradictory. Some courts have found that the term "effluent standards or limitations" found in the CWA's citizen-suit section is defined by section 502(11), which defines the term as "any restriction established by a state or the Administrator on quantities, rates, and concentrations [of pollutants]. [emphasis added]" See, e.g., United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 979 (2nd. Cir. 1984); United States v. Metropolitan Dist. Comm'n, 679 F. Supp. 1154, 1157 (D. Mass. 1988), aff'd, 865 F.2d 2 (1989). Other courts have found that the term "effluent standards or limitations" does not include any state-created laws that are not also included within an NPDES permit. See, e.g., McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1198-2000 (E.D. Cal. 1988); New York v. United States, 620 F. Supp. 374, 383 (E.D.N.Y. 1985). To compound the confusion, some courts have (properly) found that state common-law limitations are not included in the definition; but, in making their rulings, have used broad language which has the apparently unintended affect of also placing state statutory and regulatory limitations within the scope of the announced exclusion. See, e.g., Hooker, 749 F.2d at 979. Finally, the Ninth Circuit has seemingly adopted both approaches, stating in one breath that "effluent limitations may be derived from state water quality standards (i.e., agreeing that the term is

CONCLUSION

The Court GRANTS the Home Builders' Motion for Leave to File a Brief as Amicus Curiae, and GRANTS their Motion to File a Supplemental Brief as Amicus Curiae. The Court also GRANTS the Georgia Department of Natural Resources's Motion to File a Brief as Amicus Curiae. The Court DENIES Defendant's Motion to Amend, or, in the alternative, For Relief, and DENIES Plaintiff's Motion for Permanent Injunction and for Summary Judgment.

So ORDERED this 29th day of March, 1993.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

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defined by § 502(11)] and may be enforced when included in a discharger's permit." Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 850 (9th Cir. 1987) (emphasis added).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-CV-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court for a determination of whether Plaintiff has standing to assert his claims. The Court finds the Plaintiff does have standing before this Court.

BACKGROUND

I. Procedural History.

Defendant JMS Development Corporation is a Georgia corporation engaged in the development of a 19.2 acre subdivision known as Rivercliff Place ("the subdivision" or "the property") in Gwinnett County, Georgia. Plaintiff Terence Hughey is a resident of Gwinnett County who owns property adjacent to the Yellow River and topographically downhill from the subdivision.

On August 28, 1992, Plaintiff filed suit against Defendant claiming that Defendant was violating the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("the CWA"), by

discharging from the subdivision, without a permit, sedimentation collected in rainwater runoff that travels out of the subdivision, into a tributary[1], and into the Yellow River. Plaintiff requested the Court to enjoin Defendant and award damages. The Court issued a temporary restraining order ("TRO") on August 31, 1992, restraining Defendant from "discharging sand, silt, asphalt runoff and other pollutants into any waters of the United States without a permit." [5].

On October 13, 1992, Plaintiff filed a Motion to Hold Defendant in Contempt of Court for having discharged stormwater, in violation of the TRO, on September 4, 5, 27, 28, and October 4, and 8, 1992. Plaintiff's Contempt Motion, pp. 1-2. [13]. On October 15, 1992, Defendant filed a Motion to Dissolve the TRO. [14]. The Court held hearings on October 16 and November 4, 1992, and issued an Order on November 9, 1992, denying Defendant's motion to dissolve the TRO, denying Defendant's motion to dismiss Plaintiff's complaint, granting Plaintiff's motion for a preliminary injunction, and denying Plaintiff's contempt motion. Hughey v. JMS Dev. Corp., Civil Action No. 92-2051 (N.D. Ga. Nov. 9, 1992) ("Hughey I"). Defendant filed a Motion to Amend on November 19, 1992, arguing that recent developments in both the law and the facts of the case entitled it to relief from the Court's Order in Hughey I. On November 24, 1992, the Court stayed its Order in Hughey I [29].

Plaintiff later moved for summary judgment and for issuance of a permanent injunction. The Court denied Plaintiff's motion, finding that although Plaintiff had

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[1]Throughout this suit's litigation, the parties have referred to the tributary by a number of names, including the "creek" and the "stream." For clarity, the Court will refer to it only as the tributary.

established that Defendant violated the CWA, there was a genuine issue of fact as to whether Plaintiff had standing before this Court. Hughey v. JMS Dev. Corp., Civil Action No. 92-2051 (N.D. Ga. March 29, 1993) ("Hughey II"). The Court subsequently held a hearing on the question of Plaintiff's standing.

II. Facts.

Defendant's subdivision contains fifty lots for the construction of residential homes. Defendant owns some of the lots and has sold others to unrelated parties. In the Spring of 1992, Defendant began its development of the subdivision by clearing, grubbing, and grading an area of the property for the construction of three streets, with related curbing, gutters, and storm sewers. On August 6, 1992, Defendant dedicated the streets, curbing, gutters, and storm sewers to Gwinnett County, and the county accepted them.

On March 31, 1992, prior to commencing its clearing, grubbing, and grading activities, Defendant obtained a Gwinnett County development permit ("Gwinnett permit"), authorizing it to engage in land-disturbing activity in the subdivision, and permitting it, under state law, to discharge certain amounts of stormwater[2]. Gwinnett County issued the Gwinnett permit pursuant to its authority to administer Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("the SESCA") within the physical confines of Gwinnett County. See O.C.G.A. § 12-7-8.

The SESCA limits the concentration of silt that can be discharged in stormwater in Georgia. The Act prohibits

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[2]Under both federal and state law, the term "stormwater" is used for water that contains sedimentation from land-disturbing activities.

stormwater discharges that are more than "50 nephelometric turbidity units ["NTU's"] higher than the turbidity level of the receiving stream immediately upstream from the stormwater runoff discharge at the time of such discharge . . . ." O.C.G.A. § 12-7-6(18). Plaintiff presented evidence at an October 16, 1992, hearing that Defendant had discharged stormwater that was more than fifty NTU's higher than any background turbidity. See Testimony of Dr. Wade Nutter, pp. 6, 8-32, 35-39; Testimony of Terence Hughey, pp. 8-17, 24, 38-43, 59-61, 83-85, 103.[3]

On November 19, 1992, Defendant first acquired a National Pollutant Discharge Elimination System ("NPDES") stormwater permit, which generally is required in order to exempt oneself from the CWA's prohibition on discharging stormwater. Defendant's failure to obtain an NPDES permit prior to this date is due, at least in part, to the State of Georgia's failure to make NPDES stormwater permits available to potential applicants. On September 24, 1993, however, the Board of Natural Resources for the State of Georgia held that Defendant's NPDES permit was issued in violation of a procedural rule requiring a written response to all public comments on proposed permits, and the Board ordered Defendant to remand the permit. In re The Conservation Society, Inc. and Terence Hughey, Record No. DNR-EPD-WQ-AH 5-92, slip op. at pp. 2, 6, 10, 32 (Sept. 24, 1993).

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[3]Hereinafter, the Court will cite to Mr. Hughey's testimony at the October 16 and November 4, 1992, hearings as "Hughey Testimony, p. ___" and to any testimony from the June 25, 1993, hearing as "Trial Testimony, p. ___."

DISCUSSION

I. Standard of Review for Determining Standing.

The United States Supreme Court, in Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130 (1992), recently summarized the requirements for standing before a federal court as follows:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision."

Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800, 805 (11th Cir. 1993) (quoting Lujan, 112 S. Ct. at 2136 (citations omitted)). The burden of proving standing is on the plaintiff. Lujan, 112 S. Ct. at 2136 (citations omitted).

A. Injury-in-Fact.

A plaintiff's affected interest need not be large to obtain standing: "An 'identifiable trifle' will suffice." Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71 (3rd Cir. 1990) (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14, 93 S. Ct. 2405

(1973)), cert. denied, 498 U.S. 1109, 111 S. Ct. 1018 (1991). See also Georgia Envtl. Project, Inc. v. City of Atlanta, Civil Action No. 90-2403, slip op. at 11 (N.D. Ga. June 27, 1991) (Moye, J.) ("GEP I") (mentioning and appearing to follow the "identifiable trifle" standard). Harm to aesthetic and recreational interests is sufficient to confer standing. Sierra Club v. Morton, 405 U.S. 727, 735 (1972). See also Hall County Historical Soc'y, Inc. v. Georgia Dept. of Transp., 447 F. Supp. 741, 747 (N.D. Ga. 1978) (O'Kelley, J.) ("Standing is no longer confined to those who show economic harm, nor is it necessarily to be denied because the alleged injury is commonly shared. [citations omitted]"). The injury, however, must be distinct and palpable rather than abstract, conjectural, or hypothetical. Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315 (1984); S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 758 (11th Cir.), cert. denied, 111 S. Ct. 2274, 2893 (1991).

B. Traceability.

The Third Circuit has explained the burden imposed by Lujan's traceability requirement as follows:

> The requirement that plaintiff's injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment. The 'fairly traceable' requirement of the [Lujan] test is not equivalent to a requirement of tort causation. . . . In order to

> demonstrate that they are more than 'concerned bystanders,' plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm.

Powell Duffryn, 913 F.2d at 72 (citing Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 75 n.20, 78, 98 S. Ct. 2620 (1978)). The Third Circuit went on to state that this substantial likelihood,

> may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Id. (footnote omitted). The Court notes that the Third Circuit's analysis is in the context of opposing a summary judgment motion, and not in the context of prevailing on the merits.

C. Redressability.

In Powell Duffryn, the Third Circuit stated that an injunction which reduces, but doesn't eliminate, pollution in the nation's waters redresses resulting injuries "at least in part," and the circuit held that "[p]laintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." 913 F.2d at 73. The Third Circuit also stated that, in general, the award of civil penalties redresses resulting injuries because of their deterrent effect on the polluter. Id.

II. Application

A. Injury-in-Fact.

Plaintiff directs the Court's attention to evidence in the record which he contends demonstrates damage to the tributary and the Yellow River and injuries-in-fact to his aesthetic, recreational, and economic interests. Defendant argues that Plaintiff has not incurred a cognizable injury-in-fact for a variety of reasons. Defendant contends that Plaintiff's testimony at the June 25, 1993, hearing contradicts his testimony at deposition and at the October 16 and November 4, 1992, hearings, and is, therefore, not credible and should be ignored. Defendant also argues that Plaintiff has no legal right to use the tributary and has no protectable interest in the tributary. In addition, Defendant argues that Plaintiff has proffered evidence of only one date-specific discharge of stormwater, and that Plaintiff's testimony demonstrates that he was not injured on that day. Defendant argues further that Plaintiff has alleged only subjective injuries which are insufficiently concrete and overly hypothetical. Still further, Defendant argues that Plaintiff has no scientific proof that discharges from the tributary have an effect on the Yellow River. Finally, Defendant argues that Plaintiff is using his CWA suit as a means to continue his general protest of all kinds of development.

The Court will first review Plaintiff's evidence of discharges and evidence of his exposure to the discharges. Plaintiff has testified that he observed stormwater exiting the subdivision and flowing into the tributary on seven different days prior to August 31, 1992 (the date on which the Court issued the TRO). Hughey Testimony, pp. 79-85 (testifying that he observed stormwater discharges on June 8 & 30, 1992, and

commenting on photographs -entered into evidence- taken on those days), 90-96 (testifying that he observed discharges on June 8, 14, 30, July 1, 2, August 13, 16, 1992, and commenting on Plaintiff's Exhibit 25 -a video tape of the discharges); Trial Testimony, pp. 15-23 (same); Plaintiff's Exhibit 25 (video tape of discharges on those dates). Plaintiff has also testified that he observed stormwater exiting the subdivision on six different days subsequent to August 31, 1992. Hughey Testimony, pp. 6-8 (testifying that he observed discharges on Sept. 4, 5, 27, 28, Oct. 4, 8, 1992), 18-28 (commenting on Plaintiff's Exhibit 29 -a video tape of discharges on those dates). See also Trial Testimony, p. 102 (Plaintiff testifying that he filmed discharges on all of the above-mentioned dates). In addition, Plaintiff testified that he has walked the entire length of the tributary, that he has done so with the permission of the person who owns the land surrounding much of the tributary -Mr. Bill Baskin- and that he has observed sedimentation discharge from the subdivision into the tributary. Hughey Testimony, pp. 98, 105-107, 112-115.

Plaintiff offers testimony and video evidence of discharges from the tributary into the Yellow River on June 8, 1992. Hughey Testimony, p. 91 (commenting on the muddy plume exiting the tributary into the Yellow River, as shown in Plaintiff's Exhibit 25); Trial Testimony, p. 16-20 (same); Plaintiff's Exhibit 25 (the video tape showing the plume exiting the tributary into the Yellow River on June 8, 1992). See also Hughey Testimony, p. 113 (testifying generally as to the muddy plume flowing from the tributary into the Yellow River). Plaintiff does not offer any video evidence of muddy water discharging from the tributary into the Yellow River on any other date. Plaintiff testified that he has observed the Yellow River after rainfalls and has noticed that there is a red,

muddy plume where the tributary intersects with the Yellow River. Trial Testimony, pp. 20-22. Plaintiff also testified that, viewing the Yellow River from his house, he could see the same reddish color in the water. Trial Testimony, pp. 22-23.

Plaintiff has also submitted evidence from turbidity tests conducted on water samples which he took in the vicinity of the subdivision. See generally Plaintiff's Exhibit 31; Hughey Testimony, pp. 8-18. Those tests show that water discharged from Defendant's property on those days contained sedimentation, and that on six days the capacity of that stormwater was in excess of fifty NTU'S. However, Plaintiff also testified that he has not taken any scientific measurement of the damage to the Yellow River, nor has he had anyone else do so for him. Hughey Testimony, pp. 103, 111. In fact, the furthest downstream from the subdivision that Plaintiff has had testing performed is just below the point at which the stormwater exits the pipe running under Rivercliff Drive. Hughey Testimony, p. 103. This point, however, appears to be part of the tributary.

In addition, Plaintiff has testified at length on his use and enjoyment of the Yellow River and, to a lesser extent, on his enjoyment of the tributary. He has also testified on how he believes that use and enjoyment has been impaired by Defendant's discharges. See generally Trial Testimony, pp. 5 106. The Court finds that Plaintiff has made a prima facie showing that he has incurred injuries-in-fact, and that those injuries-in-fact are a result of Defendant's discharges of stormwater into the tributary and into the Yellow River.

The Court now addresses Defendant's arguments. The Court finds that when Plaintiff testified at the June 25, 1993, hearing, he contradicted his earlier testimony in only one regard -his use of the Yellow River to irrigate his property.

Plaintiff was asked in his deposition what uses he made of the Yellow River. In response he catalogued a half dozen uses and stated: "I'm sure there are others but I don't recall. They fall in those general categories." Hughey Deposition, pp. 62-63. None of those uses were remotely related to irrigation. Later, at the November 4, 1992, hearing, Plaintiff was asked how he and his family use and enjoy the benefits of the Yellow River. Plaintiff again did not mention irrigation despite being asked twice how he intended to use the river in the future. Hughey Testimony, pp. 72-74.

Other than this contradiction, the Court finds that Plaintiff's testimony is consistent as to alleged injuries in-fact to his aesthetic and, to a lesser extent, his recreational interests. The aesthetic enjoyment he derives from viewing the Yellow River and from his walks along the tributary and the Yellow River has been diminished.[4] The recreational enjoyment he receives from fishing and tubing on, and picnicking along side of, the Yellow River has been diminished.

Plaintiff claims that Defendant violated the CWA and the SESCA by discharging stormwater on the following dates in 1992: June 8, 14, 30; July 1, 2; August 13, 16; September 4, 5, 27, 28; October 4, 8. Plaintiff testified at the June 25, 1993, hearing that on each of those days he saw (and filmed)

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[4]Defendant challenges this conclusion by citing Plaintiff's testimony at the June 25, 1992, hearing found on page 57 of the transcript. That testimony establishes only that Plaintiff does not walk along or in the Yellow River while it is raining. It is silent as to Plaintiff's walking after the rain has ceased. (See Trial Testimony, p. 103: Plaintiff testifying that "[i]t generally is several days before the river turns back clear"). Defendant also cites to Plaintiff's testimony at the November 4, 1992, hearing on page 114-15 of the transcript. Contrary to Defendant's assertion, that testimony does not establish that Plaintiff walked the tributary only after the development of Rivercliff Place.

stormwater leaving the subdivision. Trial Testimony, p. 102. Plaintiff has supported this testimony with evidence in the form of video tapes, photographs, and/or turbidity testing results. Defendant argues that Plaintiff admitted at the hearings that even had there been no discharge from the subdivision, he would not have utilized the river because it would have been filled with muddy water from other sources. See Trial Testimony, p. 53 (testifying only about tubing the river), 99 (testifying about any use). However, almost immediately after testifying as described above to a question listing a number of different potential uses, Plaintiff asked to change his testimony about walking along the river, stating that he would have walked, but with less enjoyment. Trial Testimony, pp. 99-100. The Court concludes that Plaintiff was sincere in making this change.

Defendant also argues that Plaintiff failed to establish that the discharges on those days actually affected his use and enjoyment of the river. In the testimony which Defendant cites, however, Plaintiff did not state that he would not have used the Yellow River or tributary on the days he filmed. Rather, Plaintiff testified that he filmed the Yellow River and tributary because of his interest in using them. Trial Testimony, p. 59. He also testified that it would have been hard to recreate in, or use the river on, those dates, but he did not state whether his response would have been different had there been no stormwater runoff from the subdivision. Trial Testimony, p. 60-61.

Plaintiff has testified that when it rains, the stormwater which runs off from the subdivision disturbs and diminishes his ability to enjoy the tributary and the Yellow River. He has also testified that the resulting muddy condition remains for as long as a few days to a week after a rainfall. Thus, the period of

time during or immediately after a rainfall is not the only time relevant to his use or enjoyment of the tributary or Yellow River.

Plaintiff has established that his use and enjoyment of the tributary and Yellow River is impaired by stormwater runoff from the subdivision. He has also established that stormwater ran off of the subdivision and into the tributary on the dates listed above. He has further established that stormwater from the subdivision ran into the Yellow River on June 8, 1992. Therefore, absent compelling evidence to the contrary, it is logical to conclude that stormwater runoff on those days diminished his enjoyment of those waterways.

Defendant also argues that Plaintiff's injury and its measurement are entirely subjective. Defendant cites to Plaintiff's testimony from the June 25, 1993, hearing in which Plaintiff stated that his injury results from his visual awareness that the water is "really muddy," and that his awareness of the water's muddiness is based on his own personal qualitative judgment. Plaintiff also testified that some muddiness due to natural sedimentation flow is acceptable. Defendant objects to the prospect that standing and liability can be based entirely on a plaintiff's subjective opinion. Defendant fears that such a standard would make standing meaningless because any subjective opinion would be sufficient to confer standing.

Subjectivity, however, is a natural and necessary method of measuring an injury that may take the form of aesthetic impairment (so long as it is supported with evidence, and so long as the injurious substance or act is such that could realistically injure one's subjective aesthetic sensibilities). The point at which an object disturbs one's sense of aesthetics will differ from person to person. To require a plaintiff to declare an objective, quantifiable point at which an substance or act

becomes aesthetically objectionable would do little to combat subjectivity because the point at which the plaintiff decides to locate that threshold would be determined by the plaintiff's subjective sensibilities. And to require a plaintiff to meet a pre-established objective norm would be to negate aesthetic injury as an element of standing. Without the involvement of individual subjectivity, what is intended to be an analysis of aesthetic injury would become an analysis of whether a pre-established code of conduct was breached.

This acceptance of subjectivity does not, however, emasculate standing, nor does it necessarily open the floodgates of liability. The parsimony of standing and liability are protected in other ways. In the case before this Court, Plaintiff had to establish an actual personal contact with the Yellow River and/or the tributary before the question of his aesthetics even arose. In addition, without a showing that Defendant violated the CWA, Plaintiff's aesthetic judgments could in no way impose liability on Defendant. Finally, Plaintiff's claimed aesthetic impairment must have been of a type that the Court could believe Plaintiff might realistically incur.

Defendant's final argument is that Plaintiff is actually waging an anti-development battle against Gwinnett County and anyone who wishes to develop land near his property. The Court is unconcerned with Plaintiff's alleged ulterior motives. The Court will remain focused on the claims that Plaintiff has made before this Court.

B. Traceability.

In response to Plaintiff's showings regarding the tributary, Defendant argues that Plaintiff admitted that the sedimentation in the tributary could also have come from other

sources. Trial Testimony, p. 37. Even if this is so, Defendant has not offered any evidence to suggest that runoff from the subdivision does not contribute to sedimentation in the tributary. Based on the evidence before it, the Court must conclude that Plaintiff's injury, resulting from sedimentation in the tributary, is fairly traceable, at least in part, to Defendant's discharge of stormwater.

In response to Plaintiff's showing regarding the Yellow River, Defendant contends that Plaintiff cannot show that discharges from the tributary have any connection to injuries which he has sustained. Defendant cites to Plaintiff's testimony that the Yellow River is often muddy after a rainfall and that a number of sources may contribute to the muddy condition of the river. Hughey Testimony, pp. 34-35, 75. Defendant also cites to Plaintiff's admission that sedimentation may enter the tributary from sources other than Defendant's property, Trial Testimony, p. 37, and that the Yellow River above the confluence of the tributary and the river can also have a red, muddy color after rainfall. Trial Testimony, pp. 39, 43-44.

Defendant also presents the Court with evidence in the form of turbidity tests conducted on the Yellow River on four separate occasions. On May 19, 1993, Greg Wombough took water samples, at the instruction of Mr. Dirk Van Reenen, from the Yellow River at three points: One hundred feet above the point at which the tributary converges with the Yellow River (hereinafter referred to as "upstream"); one hundred feet below the point at which the tributary converges with the Yellow River ("downstream"); and at a recreation area one hundred feet downstream from Plaintiff's property ("far downstream"). See generally Trial Testimony, pp. 106-153; Defendant's Exhibit 51. Mr. Wombough testified that it was raining on

three of the four testing days, but that this information comes only from the Atlanta Journal/Constitution newspaper; he could not testify whether it had rained on the subdivision on those days. Trial Testimony, pp. 113 (testifying about November 2, 1993), 113-114, 127-128 (testifying that he obtained his information about rainfall from the Atlanta Journal/Constitution, and that he does not know whether it actually rained on any exposed dirt in the subdivision on any of the testing days), 117-118 (testifying that it had rained on May 19, 1993, but that it was not raining while he took samples), 118-119 (testifying that it was raining on May 25, 1993, during his sampling, although his data sheet suggests only trace amounts of rain that day), 119-120 (testifying that it had rained prior to his taking samples on June 14, 1993).

Turbidity testing of the samples Mr. Wombough collected shows that on two occasions the turbidity upstream was higher than that downstream; on one occasion the turbidity upstream was lower than that downstream; and on one occasion the turbidity was the same at both points. Defendant's Exhibit 51. The testing also shows that on three occasions, the turbidity far downstream was lower than the turbidity upstream, and on two occasions the turbidity far downstream was lower than the turbidity downstream. Defendant's Exhibit 51.[5] Based on this evidence, Defendant's expert witness, Mr.

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[5]Turbidity testing results:

Sample	Date	Location	Time of Sampling	Turbidity
E	11-2-92	far	8:45 am (approx.)	20
C	"	downstream	9:15 am	NTU's
D	"	upstream	after 8:45 am	25 "
		downstream		18 "

Van Reenen, opined that discharges from the tributary had no adverse effect on the Yellow River. Trial Testimony, pp. 144-145.

Plaintiff takes issue with Defendant's testing evidence on a variety of grounds. First, Plaintiff argues that without any evidence of rainfall on exposed dirt in the subdivision on the testing days, the results are irrelevant to the question whether stormwater discharged from the subdivision inflicts an injury on Plaintiff. Second, Plaintiff argues that because Mr. Wombough took his samples far downstream prior to taking his samples upstream or downstream, the readings do not reflect the turbidity of the "same water." In other words, the water sampled far downstream would have passed the upstream point and the downstream point at least twenty minutes prior to the time at which samples were taken from those two points. In that time, Plaintiff implies, changes in weather patterns or river conditions might have occurred which could have effected the testing results, but which have no bearing on the question whether stormwater discharged from the subdivision traveled

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1	5-19-93	far	3:45 pm	230 "
2	"	downstream	4:12 pm	290 "
3	"	upstream downstream	4:17 pm	240 "
4	5-25-93	far	7:45 pm	11 "
5	"	downstream	8:05 pm	12 "
6	"	upstream downstream	8:10 pm	13 "
7	6-14-93	far	10:30 am	540 "
8	"	downstream	11:30 am	440 "
9	"	upstream downstream	11:35 am	440 "

past Plaintiff's property. Third, Plaintiff argues that Defendant did not test the water for turbidity prior to November 2, 1993, and that he alleges the dates on which Plaintiff sustained his injuries were all at least one year prior to November 2, 1993. See Trial Testimony, pp. 146-147 (Mr. Van Reenen testifying that, in his opinion, the test results have no bearing on the turbidity readings in the Yellow River on dates other than the dates of the testing).

For the reasons stated by Plaintiff, the Court believes that Defendant's turbidity tests have little bearing on whether Plaintiff incurred injuries, or on whether those injuries are fairly traceable to Defendant's discharges. Accordingly, the Court finds that the injuries Plaintiff sustained due to sedimentation in the tributary are fairly traceable to Defendant's discharges of stormwater in violation of the CWA. As for Plaintiff's injuries because of sedimentation in the Yellow River, the Court finds that the existence of other sources of sedimentation and the presence of sedimentation in the Yellow River upstream of the confluence point of the tributary and the Yellow River does not preclude the Court from finding that Plaintiff could have sustained injuries, or that those injuries are fairly traceable to Defendant's discharges. However, the Court notes that on only one day did Plaintiff video tape any stormwater flow from the tributary into the Yellow River -June 8, 1993- and at no time did Plaintiff video tape or otherwise document any presence in the Yellow River along his property of stormwater which he can show was discharged from the subdivision. With nothing more than Plaintiff's testimony that he believes the offending stormwater in the tributary entered the Yellow River and traveled past his property, the Court cannot find that Plaintiff has met his burden of proof. Therefore, the Court finds that the only injury fairly

traceable to Defendant's discharged stormwater in the Yellow River is that which Plaintiff sustained because of sedimentation flowing from the tributary into the Yellow River on June 8, 1992.

C. Redressability.

Plaintiff contends that an injunction preventing Defendant from discharging stormwater without a permit will eliminate Defendant's contribution to the pollution which is injuring him and, therefore, will redress his injury. Defendant argues that an injunction will not redress Plaintiff's injuries because (1) even if Defendant ceases all stormwater discharges, sedimentation from other sources will continue to make the Yellow River muddy during and after rainfall, and (2) Defendant is no longer conducting land-disturbing activity on its property, so there is no activity to enjoin. The Court finds that Plaintiff's injuries are redressable. Defendant's completion of all land-disturbing activities is irrelevant to this decision, as it is not the activities themselves, but the stormwater discharges related to those activities that cause the injuries. Furthermore, the awarding of civil penalties will deter Defendant and other developers lacking NPDES permits from discharging stormwater into the nation's waters.

D. Prudential Considerations.

Although Plaintiff has satisfied the three-part Lujan test for standing, the Court must determine whether certain prudential considerations disfavor judicial action.

> The Supreme Court has listed three considerations that discourage judicial action despite a party's satisfaction of all three constitutional [standing] requirements:

> (1) assertion of a third party's rights; (2) allegation of a generalized grievance instead of an injury peculiar to the litigant; and (3) assertion of an injury outside the statute's. . . zone of interests.

S.J. Groves & Sons, 920 F.2d at 757 (citing Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75, 102 S. Ct. 752, 759-60 (1982)).

Defendant contends that in this case these prudential concerns should convince the Court to find that Plaintiff lacks standing. First, Defendant argues that only the Baskins have a legal right to use or enjoy the tributary, and that Plaintiff's claim, to the extent it is based on stormwater discharges into the tributary, is an assertion of a third party's rights, not his own. Second, Defendant argues that Plaintiff's true grievance is a generalized one against Gwinnett County for its failure to enforce SESCA. Third, Defendant argues that the Court would be more prudent to allow the issues raised here to be addressed through a related administrative proceeding concerning the validity of Defendant's after-acquired NPDES permit. Fourth, Defendant argues that Plaintiff is standing in the shoes of "the enforcement agency," and that because the enforcement agency failed to timely issue an NPDES permit, an action by one standing in the enforcement agency's shoes against Defendant for failing to obtain an NPDES permit violates Defendant's substantive and procedural due process rights.

The Court finds that the prudential considerations raised by Defendant do not support a denial of standing. Regardless of Plaintiff's displeasure with Gwinnett County's enforcement of the SESCA or with the legislative and

administrative branches of government, Plaintiff has plead a cognizable claim against Defendant for injuries which Plaintiff has himself incurred as a result of Defendant's discharges of stormwater. The Court has already found that Plaintiff plead a cognizable and protectable interest in the condition of the tributary, and Plaintiff claims injuries not only because of sedimentation in the tributary, but also because of sedimentation in the Yellow River. In addition, the issues raised in Plaintiff's administrative challenge to the state's NPDES permit are also distinct from the issues raised here. As for Defendant's due process claim, the law is clear that stormwater discharges without an NPDES permit are prohibited. It is Defendant's discharges, and not the State of Georgia's failure to promulgate an NPDES permit in a timely manner, that inflicted the injury.

III. Georgia's Fifty-NTU Limit.

In its March 29, 1993, Order, this Court left unresolved the question of whether SESCA's fifty-NTU limit, established at O.C.G.A. § 12-7-6(18), is enforceable in Plaintiff's citizen's suit under the Clean Water Act. Hughey II, slip op. at p. 22 n.6. The Court believes the answer is no.

33 U.S.C. § 1365 provides that a citizen may bring an action against anyone alleged to be in violation of "an effluent standard or limitation under this chapter . . . ." to 33 U.S.C. § 1365(a)(1)(A). Subsection (f) of section 1365 defines "effluent standard or limitation" as including "an effluent limitation or other limitation under section 1311 or 1312 of this title . . . ." Id. § 1365(f)(2). Section 1311 requires compliance with "any more stringent limitation, including those necessary to meet water quality standards, or schedules of compliance,

established pursuant to any State law or regulations . . . ." Id. § 1311(b)(1)(C) (emphasis added).

Defendant did not have a valid NPDES permit on the dates of his injurious discharges, and does not have a valid NPDES permit now. In fact, it appears that a relevant NPDES permit does not yet exist in the state of Georgia. As explained in earlier Orders, without a valid NPDES permit, Defendant was prohibited, by the Clean Water Act, from discharging any stormwater. As a result, Defendant's limitation on stormwater discharges has been, and continues to be, a complete limitation. Therefore, a limitation of fifty NTU's is not more stringent than the existing limitation.

CONCLUSION

The Court finds that Plaintiff has standing before this Court, as outlined above, to assert his claims against Defendant. The Court will entertain any dispositive motions based on this finding. All motions should be clear as to the precise nature of the desired rulings, and the grounds for such rulings.

So ORDERED this 15th day of December, 1993.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2501-RHH
	)	
JMS DEVELOPMENT	)	
CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This Case is before the Court on Defendant's Motion for Reconsideration [53], Plaintiff's Motion for Entry of Final Judgment and Assessment of Civil Penalties and Attorney's Fees [54], and Defendant's Motion for Final Judgment and Assessment of Attorney's Fees [56]. The Court DENIES Defendant's Motion for Reconsideration, GRANTS Plaintiff's Motion for Entry of Final Judgment and Assessment of Civil Penalties and Attorney's Fees, and DENIES Defendant's Motion for Final Judgment and Assessment of Attorney's Fees.

BACKGROUND

In an Order dated December 15, 1993, the Court found that Plaintiff has standing to assert his claims against Defendant under the Clean Water Act, 33 U.S.C. § 1251 et seq. (the "CWA"). This finding resolved the only remaining issue preventing a final ruling on Defendant's liability.

DISCUSSION

I. Defendant's Motion for Reconsideration.

In determining that Plaintiff's injuries were fairly traceable to discharges from Defendant's land-disturbing activities, the Court found that Defendant's turbidity tests were of little probative value because, among other reasons, Defendant did not present any evidence of actual rainfall on exposed dirt in the subdivision on the testing days, and the tests were taken approximately one year after Plaintiff incurred the injuries for which the Court found he has standing to sue.

In moving the Court to reconsider its ruling, Defendant directs the Court's attention to evidence of land-disturbing activities in the subdivision on the testing days. Defendant's proffer does not entitle it to a contrary ruling from the Court. First, Defendant's evidence of land-disturbing activity is part of the record of a different case (one brought by Mr. Hughey against another defendant). Defendant has not demonstrated to this Court that this evidence was in the record of this case, and Defendant has not demonstrated that it cited to the evidence in arguing against Plaintiff's standing. Second, Defendant's proffered evidence is probative of land-disturbing activities on the testing days, but is not probative of rainfall on disturbed land on the testing days. Third, even if the Court accepted Defendant's current proffer as evidence of rainfall on disturbed land on the testing days, it has little probative value because the tests were all conducted approximately one year after the dates on which Plaintiff sustained his injuries. The conditions in the subdivision which allowed for storm water discharges in the Summer-Fall of 1992 (the time-frame of Plaintiff's injuries) may have changed significantly by the Summer-Fall 1993 (the time-frame of Defendant's turbidity tests). The Court, therefore, denies Defendant's Motion.

II. Defendant's Motion for Judgment.

Defendant moves the Court to enter final judgment in its favor, arguing that Plaintiff failed to prove that Defendant's violation of the CWA was ongoing and continuous at the time Plaintiff filed his suit. The Supreme Court instructs that a Clean Water Act plaintiff must "allege a state of either continuous or intermittent violation -that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 57, 108 S. Ct. 376 (1987). The Supreme Court also instructs that the mootness doctrine "protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'" Id. at 66 (citations omitted). The Eleventh Circuit has interpreted this language to mean that a CWA plaintiff can survive a claim of mootness only if, on the date the plaintiff filed its complaint, the defendant continued to be in violation, or there existed a "'continuing likelihood of a recurrence in intermittent or sporadic violations.'" Atlantic States Legal Found. v. Tyson Foods, 897 F.2d 1128, 1134-35 & n. 12 (11th Cir. 1990) (citation omitted). If, after the complaint is filed, the defendant comes into compliance with the Act, the plaintiff's claims for injunctive relief are mooted, but its claims for civil penalties survive. Id. at 1135.

Plaintiff filed his Complaint on August 28, 1992. Plaintiff alleged continuous and ongoing violations and requested injunctive and monetary relief. The Court found, in its December 15, 1993, Order, that Defendant had discharged storm water into the tributary, in violation of the CWA, on 13

dates in 1992 (June 8, 14, 30, July 1, 2, August 13, 16, September 4, 5, 27, 28, October 4, 8), and that Defendant had discharged storm water into the Yellow River, in violation of the CWA, on one date (June 8, 1992)[1]. Hughey v. JMS, Civil Action No. 92-2051, slip op. at 9-10, 13, 15, 22, 27 (N.D. Ga. Dec. 15, 1993) (hereinafter Hughey III). Defendant now appears to argue that the only violations relevant to Plaintiff's suit are those involving discharges into the Yellow River, as opposed to those involving discharges into the tributary. Defendant's Motion, pp. 4-5. Accordingly, Defendant argues that because the Court found Defendant had discharged storm water into the Yellow River only once, and because that one incident occurred prior to Plaintiff filing his Complaint, the Court should dismiss Plaintiff's suit as moot. Id. Defendant, asserting that only this interpretation is consistent with the Court's earlier rulings, argues as follows:

> If Plaintiff's construction is correct, then the June 25, 1993, trial was useless since the Court had previously found that Defendant discharged sedimentation into the tributary. Hughey I [November 9, 1992, Order], p. 30. With regard to Plaintiff's standing, the Court's focus in Hughey II [March 29, 1993, Order] was on the Yellow River. The Court denied Plaintiff's motion for summary judgment on the basis that "Plaintiff's evidence on the condition of the Yellow River (as opposed to the condition of the stream and drainage pipes just below the subdivision) is strictly anecdotal and much of it is not date specific." (Hughey II, p. 21).

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[1]In its December 15, 1993, Order, the Court mistakenly stated that the date of the established discharge into the Yellow River was June 8, 1993. The actual date was June 8, 1992.

> In Hughey III, this Court did not stop with its analysis of Plaintiff's allegations regarding the tributary, but looked to Plaintiff's proof that the "offending water in the tributary entered the Yellow River and traveled past his property" (Hughey III at 22) and found that Plaintiff only met his burden as to the June 8, 1992, discharge. The only construction consistent with the prior Orders entered by this Court is that Plaintiff has only proved all elements of his case with regard to the June 8, 1992, discharge.

Defendant's Motion, pp. 4-5.

Defendant is correct, to a limited extent, that the Court focused its attention on discharges into the Yellow River in its March 29, 1993, Order (hereinafter Hughey II). The Court did state that Plaintiff's evidence of the condition of the Yellow River on the dates of the alleged violations was anecdotal, in contrast to the evidence of the condition of the tributary. Hughey II at p. 21. However, based on the evidence then before the Court, and on the motions upon which the Court was ruling, the Court's statement was not inconsistent with a then-existing understanding that discharges into the tributary were actionable in and of themselves. As of the date on which the Court issued Hughey II, Plaintiff had established, to a certain extent, his legal interest in the Yellow River, but had not yet established a legal interest in the tributary. Thus, when the question of actual impact on the Yellow River arose, issuance of summary judgment or a permanent injunction became inappropriate. Plaintiff's failure to have established, by that point in the proceedings, an interest in the tributary did not preclude him from presenting at the June 25, 1993, hearing evidence on the matter and establishing such an interest. In

fact, it was precisely because the issue of standing had not been fully developed that the Court convened the hearing. Thus, the Court's language in Hughey II did not preclude Plaintiff from asserting injuries-in-fact based on discharges into the tributary.

The Court also finds that Defendant was aware that Plaintiff's claims were not limited necessarily to discharges into the Yellow River, but could also encompass discharges into the tributary. Defendant's understanding of this point is evidenced by its debating throughout this case the condition of the tributary and arguing at the June 25, 1993, hearing that Plaintiff had no permission to enter the land through which the tributary ran, and, therefore, had not interest in the tributary which Defendant could have injured. For example, in its Trial Brief on Plaintiff's Standing [46] at page 4, Defendant argued that Plaintiff could not establish standing based on discharges into the tributary. Defendant did not base its argument on an assertion that the scope of Plaintiff's claim was limited to discharges into the Yellow River. Instead, Defendant based its argument on the assertion that Plaintiff failed to prove that he had any legal interest in the tributary or in the tributary's condition. Implicit in this argument is the recognition that Plaintiff's claim included the effect of Defendant's discharges on the tributary.

Nonetheless, even if Plaintiff failed to prove that he was injured subsequent to the June 8, 1993, discharge, he has proved that Defendant continued to discharge storm water into waters of the United States (i.e., the tributary) after the date upon which Plaintiff filed his Complaint. This is sufficient to survive a claim of mootness. As the Eleventh Circuit stated in Tyson Foods, a plaintiff's CWA claim is not moot if, on or after the date upon which the plaintiff files its complaint, "the defendants continued to violate [the CWA]." Tyson Foods,

897 F.2d at 1134. Thus, even if Plaintiff's suit was limited to injuries resulting from discharges into the Yellow River (and not the tributary), Plaintiff's claims are not moot because he has presented uncontroverted evidence to the Court that Defendant continued to violate the CWA after Plaintiff filed his suit. The Court has found no authority for the proposition (implied in Defendant's argument) that a CWA plaintiff must also show that the defendant's continued violations continued to injure the plaintiff. The language of Tyson Foods suggests that such a proposition would be incorrect, and this Court finds that proof of standing and proof of continued violations after the complaint is filed is sufficient to defeat a claim of mootness. See Defendant's Motion at p. 5 (arguing that under Tyson Foods, Plaintiff had to prove that "noncompliance was ongoing at the time the suit was filed in order to maintain an action for civil penalties," but stating incorrectly that the Court found, in Hughey III, that Plaintiff did not meet this burden of proof. This Court found only that Plaintiff did not prove discharges into the Yellow River on more than one occasion; the Court clearly found that Defendant continued to discharge storm water into waters of the United States after Plaintiff filed his complaint). See also Tyson Foods, 897 F.2d at 1141 (finding that citizen suits under the CWA for damages do not serve only to compensate a plaintiff for its injury, but also to "punish violators for their non-compliance and to serve the goal of retribution.").

III. Plaintiff's Motion for Final Judgment.

The Court has determined, it its previous Orders, that Plaintiff has standing to maintain his suit, that Defendant has discharged pollutants from a point source into waters of the United States, that Defendant's discharges violated an effluent

standard or limitation under the CWA, and that Defendant's violations are continuing at the time Plaintiff filed suit. Plaintiff, thus, has prevailed on his claim against Defendant under the CWA.

A. Civil Penalties.

Section 309(d) of the CWA authorizes courts to impose civil penalties for violations of the CWA. 33 U.S.C. § 1365(a). The Eleventh Circuit instructs that where a defendant is found to have violated an effluent standard or limitation, the court is required to assess a civil penalty. Tyson Foods, 897 F.2d at 1142.

> In determining the amount of a civil penalty, the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, and good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

In applying the CWA, the Court must first determine the maximum fine for which Defendant may be held liable. Tyson Foods, 897 F.2d at 1137. The Court may then reduce the amount of the civil penalty, but must do so "in accordance with factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." Id. at 1142. Within this framework, the final amount to be assessed is left to the Court's discretion. Id.

1. Maximum Penalty.

The Court finds that Plaintiff has demonstrated discharges from point sources on thirteen days: nine days on which the discharges came from only one point source, four days on which the discharges came from two point sources. This makes for a total of seventeen separate violations, each carrying a maximum civil penalty of $25,000. Thus, the total maximum penalty is $425,000.

2. Seriousness of the Violations.

Plaintiff has shown that Defendant's discharges greatly exceeded the fifty-NTU standard established by the Georgia Soil Erosion and Sedimentation Control Act ("SESCA"). Plaintiff has also shown that the discharged sediment has settled to the bottom of the receiving waters and may have contributed to a decline of aquatic life. Plaintiff has further shown that his aesthetic enjoyment of the water has diminished because of the discharges. The Court notes, however, that Defendant's discharges pose no threat to human health, and that much of the damage will be reversed with the passage of a relatively short amount of time.

3. Economic Benefit Resulting from the Violation.

Plaintiff argues that Defendant could have installed sedimentation control devices which would have prevented storm water discharges, but chose not to incur the expense of doing so. If it was impossible for Defendant to install control devices capable of preventing storm water discharges, then under the CWA, Defendant's only option would have been not to commence any land disturbing activities -meaning no income. Under such a scenario, Defendant would have benefited considerably by violating the CWA rather than remaining in compliance with it. However, if it was possible for Defendant to install control devices capable of preventing

storm water discharges, then the economic benefit of not doing is represented by the additional cost of upgrading the devices to accomplish that task. This cost would have been much smaller than cost of complete abstinence. The Court is willing to accept Plaintiff's argument that Defendant could have installed fully effective devices and procedures. Accordingly, the Court finds that the economic benefit Defendant derived from not upgrading its devices to that level is relative minor.

4. History of Such Violations.

The Court finds that apart from its actions in the Rivercliff subdivision, Defendant has no history of CWA violations.

5. Good-Faith Efforts to Comply with the Applicable Requirements.

Plaintiff claims that Defendant did not undertake good faith efforts to comply with applicable requirements because it did not even attempt to obtain an NPDES permit until approximately six months after it began discharging storm water from the subdivision. Although Defendant did not obtain an NPDES permit, and did not abstain from land disturbing activities while waiting to obtain one, Defendant did employ a series of measures designed to decrease the amount of storm water which is discharged. Those efforts ultimately were not successful and, as a result, Defendant continued to discharge storm water without property authority. But Defendant's efforts do represent a concerted, though insufficient, effort to stem the flow of those discharges.

6. Economic Impact of the Penalty on the Violator.

Plaintiff argues that the Court should determine the value of Defendant's interest in the subdivision and set penalties at a level which, in that context, will constitute more than just a "cost of doing business." Defendant's evidence

shows that although the asking price for all of its lots is approximately $1,400,000, its profit margin is relatively small. the Court will take into consideration the value of Defendant's interests.

7. Final Amount of Civil Penalties.

The Court finds that Plaintiff is entitled to recover from Defendant $500 for each violation of the CWA. This figure is based foremost on the Court's opinion that the seriousness of Defendant's violations was relatively slight, especially when compared to the types of discharges that can warrant maximum penalties (i.e., highly toxic chemicals discharged by the ton). The Court also bases its reduction from the maximum on the fact that Defendant has no evident history of such violations, and that Defendant has demonstrated some good faith effort on comply with the CWA. Finally, the Court finds that the amount of the penalties are appropriate in the context of the subdivision's value and the size of Defendant's economic benefit from having violated the CWA.

B. [No "Section 'B'" found in document]

C. Permanent Injunction.

In opposition to Plaintiff's request for a permanent injunction, Defendant argues that Plaintiff will not suffer irreparable harm, and that there is no likelihood of future violations because it has ceased all land disturbing activities. The Court finds that the probable injuries to Plaintiff's aesthetic and recreational interests from future violations are of an irreparable nature because these interests cannot be compensated fully by future monetary payments. The Court also finds that Defendant need not be actively engaged in the land disturbing activities for its future discharges from land

disturbed by prior activities to constitute a violation. A mere temporal spacing between the land disturbing activities and the storm water discharge from the results of those activities cannot absolve one who still owns the subject land of liability for those discharges. The Court, therefore, orders that Defendant shall not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place if such discharge would be in violation of the Clean Water Act.

D. Attorney's Fees.

The CWA authorizes courts to award to a prevailing or substantially prevailing party the costs of litigation, including reasonable attorney and expert witness fees. Id. § 1365(d). The court cannot deny fees and costs absent good cause. Tyson Foods, 897 F.2d at 1142. The Court finds that Plaintiff is entitled to recover his costs of litigation and his attorney's fees reasonably incurred in litigating his claims.

CONCLUSION

The Court DENIES Defendant's Motion for Reconsideration [53], GRANTS Plaintiff's Motion for Entry of Final Judgment and Assessment of Civil Penalties and Attorney's Fees [54], and DENIES Defendant's Motion for Final Judgment and Assessment of Attorney's Fees [56].

The Court ORDERS that Defendant pay to Plaintiff $8,500 in civil penalties and reimburse Plaintiff for his costs of litigation and attorney's fees reasonably incurred in litigating his claims.

The Court also ORDERS that Defendant shall not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known

as Rivercliff Place if such discharge would be in violation of the Clean Water Act.

So ORDERED this 24th day of February, 1994.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-CV-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on Plaintiff's Motion for Award of Attorneys' Fees and Costs [62] and Attorney Gregory W. Blount's Motion to Withdraw [63]. The Court DEFERS RULING on Plaintiff's Motion for Award of Attorney's Fees and Costs and GRANTS Gregory W. Blount's Motion to Withdraw.

BACKGROUND

On February 24, 1994, the Court ordered that final judgment be entered in this case in favor of Plaintiff in his suit against Defendant pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. (the "CWA"). In that Order, the to recover his fees reasonably Court found that Plaintiff was entitled to recover his costs of litigation and his attorneys' fees reasonably incurred in litigating his claims. Hughey v. JMS Dev. Corp., Civil Action No. 92-2051, slip op. at p. 15 (N.D. Ga. Feb. 24, 1994). Plaintiff has now moved the Court for an award of

attorneys' fees and costs, and Defendant has filed an objection thereto.

DISCUSSION

I. Attorney Gregory W. Blount's Motion to Withdraw.

The Court grants Mr. Blount's Motion to Withdraw as unopposed.

II. Plaintiff's Motion for Award of Attorneys' Fees and Costs.

Defendant filed a Notice of Appeal on March 23, 1994, which the Eleventh Circuit acknowledged on April 22, 1994. Defendant also filed its objections to Plaintiff's Motion for Award of Attorneys' Fees and Costs on April 28, 1994. Plaintiff has moved the Court to award it $114.324 in attorneys' fees, $10,744.23 in expert witness fees, and $5,909-93 in out-of-pocket expenses. Plaintiff's Petition for Award of Statutory Attorneys' Fees and Expenses [67]. Plaintiff has also submitted a bill of costs for $6,270.79. Plaintiff's Bill of Costs [65]. Defendant does not contest the hourly rate at which Plaintiff's attorneys bill their services. Defendant does object to some of the hours billed and contends that Plaintiff's total award should be reduced for less than complete success.

A. Defendant's Specific Objections.

1. Defendant contends that Plaintiff is seeking to recover fees and expenses which were not incurred in the prosecution of his claims against Defendant - Specifically, Defendant argues that Plaintiff is trying to recover his fees and expenses incurred in successfully challenging the State of Georgia's NPDES general permit. Defendant sought to come under the permit, but was thwarted in its attempt by Plaintiff's

challenge. Plaintiff's challenge, however, was directed not at Defendant's permit per se, but at the legitimacy of the State's issuance of the permits in general. Furthermore, Plaintiff's challenge was not formally a part of the instant litigation. Accordingly, the Court finds that Plaintiff may not recover his attorneys' fees and expenses associated with his challenge of the general permit.

2. Defendant contends that Plaintiff is seeking to recover fees and expenses incurred in pursuing claims against other defendants in other suits. Specifically, Defendant argues that Plaintiff is trying to recover his fees and expenses incurred in a different suit against other parties involved in construction activities at the Rivercliff Place Subdivision. See Hughey v. Norwest, Civil Action No. 93-165 (N.D. Ga.) (Hall, J.). Defendant was not named in that litigation. The Court finds that Plaintiff may not recover his fees and expenses which were associated with his suit against defendants Norwest, et al., and not associated with the instant suit.

3. Defendant contends that Plaintiff is seeking to recover fees and expenses for multiple attorneys doing the same work. specifically, Defendant objects to instances in which two or three attorneys each reviewed an identical document and then submitted a bill for the time that each of them spent on the review. Defendant also objects to instances in which two or three attorneys conferred on the case and then submitted a bill for the time that each of them spent conferring.

In Norman v. Housing Auth. of City of Montgomery, the Eleventh Circuit instructed that courts should exclude from fee awards reimbursement for redundant hours. 836 F.2d 1292, 1301-02 (11th Cir. 1988). With regard to attorney conferences, the former Fifth Circuit stated:

> if more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a court room or conference, when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974). In a more recent opinion, however, the Eleventh Circuit cited Johnson v. Georgia Highway Express and cautioned that a reduction in a fee award is warranted "only if the attorneys are unreasonable doing the same work." Johnson v. Univ. College of Univ. of Alabama in Birmingham, 706 F.2d 1205, 1208 (11th Cir.) (emphasis in original), cert. denied, 464 U.S. 994 (1983). Rulings by courts in this and other districts indicate that a distinction should be drawn between billings for two different types of "conferences." Where a prevailing party attempts to recover fees for more than one attorney's time expended in conferences with counsel for another party, or with various non-parties, the court should be very hesitant to award fees for more than one attorney, the logic being that, in most cases, one attorney is sufficient to represent a client's interests to outside entities. See, e.g., Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 350 (N.D. Ga. 1992) (Forrester, J.). In contrast, courts should be a little more receptive to billings for more than one

attorney's time expended in conferences with other attorneys representing the same client. The logic here is that the attorneys are developing a strategy, and each attorney involved in representing the client must be aware of, and often involved in creating, the strategy for representing that client. In this latter situation, courts should ensure that the conferences are not too heavily attended or too frequent in number. See, e.g., Mississippi State Chapter Operation PUSH v. Mabus, 788 F. Supp. 1406, 1418 (N.D. Miss. 1992) ("Conferences should be held only when necessary, which should not be very often."); Pierce v. F.R. Tripler & Co., 770 F. Supp. 118, 121-22 (S.D.N.Y. 1991) (finding that "it is not unreasonable to assign -over the course of four years-- different attorneys to the various stages of a case necessitating several briefings and conferences."), aff'd in part on other grounds, 955 F.2d 820 (2d Cir. 1992); Wilder v. Bernstein, 725 F. Supp. 1324, 1337 (S.D.N.Y. 1989) (reducing by twenty percent the amount of a fee request because, among other things, an "excessive amount of time was spent by [counsel] participating in conferences with clients and co-counsel."), rev'd on other grounds, 944 F.2d 1028 (2d Cir. 1991); Skelton v. General Motors Corp., 661 F. Supp. 1368, 1383-84 (N.D. Ill. 1987) (reducing by ten percent the prevailing party's fee request because, although having more than one attorney review documents and attend conferences may be warranted, here there was "some duplication of effort and extensive reviewing and conferring with limited benefit to the [plaintiff] class."), aff'd in part and rev'd in part on other grounds, 860 F.2d 250 (7th Cir. 1988).

After reviewing those billings to which Defendant objects, the Court finds that Plaintiff is entitled to recover on those billings minus $94.50. The Court finds that the conferences were all short in duration, and each corresponded

with a significant filing with or ruling from the Court. It does not appear that these conferences were merely administrative in nature, nor were they obviously unnecessary. The court also finds that the attorneys' reviewings of briefs were generally short in duration. For the most part, those attorneys reviewing briefs and attending conferences were actively involved in each stage of this case. The only exception which this Court has found is a charge for $94.50 attributed to .70 hours of review and conference attendance on January 7, 1993, by Mark Kinzer. The review and conference concerned Defendant's response to Plaintiff's Motion for Summary Judgment, but Mr. Kinzer did not participate in drafting a reply to Defendant's response, so his review of the response and attendance at the conference is unnecessarily duplicative of the two other attorneys, participation. Accordingly, the Court reduces Plaintiff's request by $94.50.

Defendant also seeks reimbursement for three attorneys' time at hearings held on October 16, 1992, and on November 4, 1992. The Court finds that billing for the attendance of three attorneys at these hearings is redundant and excessive. The Court, therefore, deducts from Plaintiff's request the amount requested for the third attorney at those hearings.

4. Defendant contends that Plaintiff is seeking to recover fees and expenses for claims which ultimately were unsuccessful. Specifically, Defendant argues that Plaintiff is trying to recover his fees and expenses incurred in pursuing his unsuccessful motion for contempt against Defendant. The Court finds that Plaintiff may not recover his attorneys' fees and expenses associated with his motion for contempt.

5. Defendant objects to Plaintiff's request to recover fees and expenses for his expert witness on two grounds. First, Defendant argues that Plaintiff did not delineate

the nature of the services rendered by his expert witness. Second, Defendant argues that any billing by the expert witness subsequent to November 4, 1992, should not be reimbursed because after that date the Court did not receive any additional testimony from the witness.

The Court finds that Plaintiff is not entitled to recover any fees and expenses for his expert witness which were incurred subsequent to November 4, 1992. The Court also finds that Plaintiff did not adequately delineate the nature of the services rendered by his expert witness. See Plaintiff's Petition for Award of Statutory Attorneys' Fees and Expenses, Exhibit D. The Court finds that Plaintiff is entitled to recovery only those fees and expenses for his expert witness which are reasonably incurred prior to November 4, 1992, and which are adequately delineated by Plaintiff in a filing with this Court. Plaintiff may delineate the nature of the expert witness, work in his supplemental filing (see below).

6. Defendant objects to the expenses sought in the petition because Plaintiff does not offer an explanation for them. The Court finds that Plaintiff may only recover those expenses which are reasonably incurred and adequately explained. Plaintiff may provide an explanation for them in his supplemental filing (see below).

B. Defendant's General Objection.

As a general matter, Defendant does not dispute that Plaintiff's award request complies with the requirements set forth in Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). Defendant contends, however, that Plaintiff should recover only a percentage of his request because he was not wholly successful in his claims. Specifically, Defendant argues that Plaintiff sought an

injunction enjoining Defendant from further developing the subdivision, but received instead an injunction merely enjoining further violation of the CWA. Defendant also argues that Plaintiff sought hundreds of thousands of dollars in CWA penalties, but was awarded only $8,500. Defendant argues further that because it did not contest the factual underpinnings of Plaintiff's claims, the case was relatively easy litigate. Finally, Defendant argues that Plaintiff seeks to recover for an inordinate amount of associate attorney time spent on researching and briefing issues in the case.

The Court finds that the relatively small size of the CWA penalty awarded to Plaintiff reflects the relative seriousness of Defendant's violation and not the relative merits of Plaintiff's claims. Therefore, the fact that Plaintiff recovered only a fraction of the amount it sought does not diminish the breadth of its victory. The Court also finds that although Defendant did not contest all of the factual underpinnings of Plaintiff's claims, Defendant did mount a spirited defense, and Plaintiff was put to the task of presenting detailed legal and factual arguments. The Court finds further that Plaintiff does not seek to recover for an inordinate amount of associate attorney time. Defendant is correct, however, in arguing that Plaintiff did not secure an injunction against Defendant of quite the scope he had requested. Nonetheless, the Court finds that Plaintiff did secure a meaningful injunction prohibiting future offending actions and did prevail on his underlying claims against Defendant. The Court declines to reduce Plaintiff's award on these general grounds.

C. Discrepancy in Amounts.

Plaintiff informs the Court that his request for an award of attorneys' fees and costs totals $130,978.16. Plaintiff's

Petition for Award of Statutory Attorneys Fees and Expenses, p. 1. Defendant argues that by its calculations, Plaintiff's total request equals only $121,210.88. Defendant's Objection to Plaintiff's Petition, p. 1, n. 1. The Court orders Plaintiff to submit a supplement to its Motion for Award of Attorneys' Fees in which he explains or resolves the discrepancy between his calculation of the amount of his request and Defendant's calculation.

D. Supplement to Plaintiff's Motion.

In order to address and resolve some of the disputes concerning Plaintiff's Petition, the Court orders Plaintiff to file a supplement to its Petition in which he is to do the following:

(1) Explain or resolve the discrepancy between his calculation of the amount of his request and Defendant's calculation;

(2) Deduct from the amount requested his attorneys' fees and expenses associated with his challenge of the general permit;

(3) Deduct from the amount requested his fees and expenses which were associated with his suit against defendants Norwest, et al., but which were not associated with the instant suit;

(4) Deduct from the amount requested the charge for $94.50 attributed to .70 hours of review and conference attendance on January 7, 1993, by Mark Kinzer;

(5) Deduct from the amount requested the fees and expenses associated with a third attorney attending the October 16, 1992, and November 4, 1992, hearings.

(6) Deduct from the amount requested his attorneys' fees and expenses associated with his motion for contempt;

(7) Delineate the nature of his expert witness' work for which he is seeking reimbursement;

(8) Provide a more detailed explanation for the expenses for which he seeks reimbursement.

(9) Provide a final tally of the amount of award to which he is entitled.

Plaintiff's supplement need not be long, overly detailed or overly formalistic. It need only provide a sufficient response to the instructions listed above. Plaintiff is to file its Supplement within ten days of the date of this order. Defendant may file an objection thereto within ten days of receipt of Plaintiff's Supplement.

CONCLUSION

The Court DEFERS RULING on Plaintiff's Motion for Award of Attorneys' Fees and Costs [62] and GRANTS Attorney Gregory W. Blount's Motion to Withdraw [63]. The Court also ORDERS Plaintiff to comply with the instructions contained in this Order.

So ORDERED this 19th day of May, 1994.

[signed]

ROBERT HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on Plaintiff's Motion for Award of Attorneys Fees and Costs [62]. The Court GRANTS Plaintiff's motion.

In an Order dated May 19, 1994, the Court ordered Plaintiff to supplement his Motion for Award of Attorneys' Fees and Costs to address nine specific issues. Plaintiff has complied with the Order, and the Court finds that Plaintiff is entitled to recover from Defendant $105,992.60 in attorneys' fees, $8,042.16 in expert fees, $4,876.48 in expenses and $6,270.79 in costs.

So ORDERED this 24th day of June, 1994.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	1:92-cv-2051-RHH
	:	
JMS DEVELOPMENT CORPORATION,	:	
	:	
Defendant.	:	

JUDGMENT

This action having come before the Court, Robert H. Hall, United States District Judge, for consideration of motion for award of attorneys' fees, and the Court having ruled on same, it is

Ordered and Adjudged that the plaintiff, Terence D. Hughey recover from the defendant, JMS Development Corporation, the sum of $105,992.50 in attorney fees and $8,042.16 in expert fees and $4,876.48 in expenses and $6,270.79 in costs.

Dated at Atlanta, Georgia, this 7th day of July, 1994.

Luther D. Thomas, Clerk

By: [signed]
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
July 8, 1994
Luther D. Thomas, Clerk

By: [signed]
Deputy Clerk

The Plain Dealer
Cleveland, Ohio
June 24, 1969

City Investigating Cause of River Fire

A fire on the Cuyahoga River Sunday which caused $45,000 damage is under investigation by the city's Bureau of Industrial Waste, Utilities Director Ben S. Stefanski II said yesterday.

Stefanski said investigators are attempting to learn what type of combustible substance was dumped into the river and by what company.

"IT PROBABLY HAD to be some kind of gasoline or kerosene," Stefanski said. "The oil that usually gets into the river by dumping or discharge from boats, is of low grade and would be non-inflamable in the water."

Stefanski and Mayor Carl B. Stokes yesterday toured the site of the fire which destroyed two railroad trestles.

A formal complaint to the state government will be filed by the mayor, Stefanski said, because of state licensing for industries along the river to dump pollutants in the river.

"WE HAVE no jurisdiction over what is dumped in there. The state licenses the industries and gives them legal authority to dump in the river. Actually, the state gives them a license to pollute."

Stefanski said his department is compiling a list of industrial offenders along the river to include in the complaint to the state.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

MOTION OF THE ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES TO FILE A BRIEF AS AMICUS CURIAE[1]

....

In 1975, however, the Georgia Assembly enacted the Erosion and Sedimentation Act of 1975, O.C.G.A. Section 12-7-1, et seq. which authorizes the Board of Natural Resources to regulate certain types of land-disturbing activity including many types of building construction. The Act defines land-disturbing activity as "any activity which may result in soil erosion from water or wind and the movement of sediments into state water or onto lands within the state,

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1 Only relevant portions included.

including, but not limited to, clearing, dredging, grading, excavating, transporting, and filling of land ...." O.C.G.A. Section 12-7-3(8). This Act reflects the Georgia General Assembly's recognition that storm water discharges associated with land-disturbing activities were a significant cause of water quality degradation due to the introduction into the water column of sediments and suspended solids. Although Georgia EPD did not initially address the problem of stormwater discharges through the NPDES program, significant efforts to control storm water runoff have been made through the Erosion and Sedimentation Control Program.

[U.S. EPA Letterhead]

Environmental News

EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT[1]

Thursday, September 3, 1992
Sean McElheney 202-260-1387

In order to control storm water run-off from tens of thousands of facilities in 12 states and 6 territories nationwide, EPA today issued final general permits for storm water discharges associated with industrial activity and new construction. Facilities must submit a short application to EPA by Oct. 1, 1992 to be covered by the permits.

The general permits are National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). EPA is issuing today's general permits specifically for the 12 states and six territories that are not authorized to administer the NPDES program (Alaska, Ariz., Fla, Idaho, La., Maine, Mass., N.H., N.M., Okla., S.D., Texas, American Samoa, District of Columbia, Guam, Northern Mariana Islands, Puerto Rico and the Trust Territory of the Pacific Islands).

Two types of general permits are being issued: one covers construction sites and the other covers all other

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1 Only relevant portions included.

industrial activity. EPA estimates that over 25,000 industrial facilities and construction sites are eligible for coverage under the general permits in the above states and territories.

Storm water is a leading source of water pollution in the United States, causing an estimated one-third of impaired water quality nationwide. Today's action will improve the quality of the nation's surface waters by reducing pollution from storm sewers and construction sites were land is disturbed.

"Run-off from storm water and other non-point sources is the largest remaining, virtually unaddressed source of water pollution," said LaJuana Wilcher, EPA Assistant Administrator for Water. "Controlling storm water run-off will challenge U.S. industrial facilities to develop new pollution prevention strategies. Yet the payoffs, in improved water quality, will be substantial. Through these permits, we are trying to minimize the burdens while achieving the results we all want," Wilcher said.

[55 Federal Register, 47790 (Nov. 16, 1990]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT APPLICATION REGULATIONS FOR STORM WATER DISCHARGES

Environmental Protection Agency
Final Rule

[text omitted]

I. Background and Water Quality Concerns

The 1972 amendments to the Federal Water Pollution Control Act (referred to as the Clean Water Act or CWA), prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by an NPDES permit.

[text omitted]

[60 Federal Register, 62546 (Dec. 6, 1995)]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT APPLICATION REQUIREMENTS FOR PUBLICLY OWNED TREATMENT WORKS AND OTHER TREATMENT WORKS TREATING DOMESTIC SEWAGE

Environmental Protection Agency
Proposed Rule

[text omitted]

B. History of the NPDES Permit Program

1. National Pollutant Discharge Elimination System

a. Federal Water Pollution Control Act Amendments of 1972

In response to this dilemma, Congress passed the CWA. Section 402 directed EPA to assume a substantial role in directing and defining the nation's water pollution control programs. The Act established the National Pollutant Discharge Elimination System (NPDES) permit program to be administered by EPA and the States with EPA approval. The NPDES program prohibits the discharge of any pollutant into waters of the United States except when authorized by a permit (sec. 301(a) and 402).

[text omitted]

[60 Federal Register 53529 (Oct. 16, 1995)]

WHOLE EFFLUENT TOXICITY: GUIDELINES ESTABLISHING TEST PROCEDURES FOR THE ANALYSIS OF POLLUTANTS

Environmental Protection Agency
Final Rule

[text omitted]

I. Authority

EPA is promulgating this rule under the authority of sections 301, 304(h), and 501(a) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. 1251 et seq., 33 U.S.C. 1311, 1314(h), 1361(a). Section 301 of the Act prohibits the discharge of any pollutant into navigable waters unless the discharge complies with certain requirements of the Act, including a requirement for a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to CWA section 402.

[text omitted]

[61 Federal Register 1730 (Jan. 23, 1996)]

GUIDELINES ESTABLISHING TEST PROCEDURES FOR THE ANALYSIS OF OIL AND GREASE AND TOTAL PETROLEUM HYDROCARBONS

Environmental Protection Agency
Proposed Rule

[text omitted]

SUPPLEMENTARY INFORMATION:

1. Authority

A. Clean Water Act

Today's proposal is pursuant to the authority of sections 301, 304(h), and 501(a) of the Clean Water Act (CWA), 33 U.S.C. 1314(h), 1361(a) (the "Act"). Section 301 of the Act prohibits the discharge of any pollutant into navigable waters unless the discharge complies with an NPDES permit, issued under section 402 of the Act.

[text omitted]